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Nos. 744 and 783

In the Supreme Court of the United States

OCTOBER TERM, 1941

UNITED STATES OF AMERICA, PETITIONER

v.

WRIGHTWOOD DAIRY COMPANY

WRIGHTWOOD DAIRY COMPANY, CROSS-PETITIONER

v.

UNITED STATES OF AMERICA

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINIONS BELOW

No opinion was rendered by the United States District Court for the Northern District of Illinois, Eastern Division. The District Court's findings of fact and conclusions of law appear at R. 245–247. The opinion of the Circuit Court of Appeals (R. 270) is reported at 123 F. (2d) 100.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on October 27, 1941 (R. 275). The petition for certiorari in No. 744 was filed November 14, 1941, and the cross-petition for certiorari in No. 783 was filed December 4, 1941. Both petitions were granted December 8, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

In No. 744 the questions presented are:

(1) Whether federal regulation of the price of intrastate milk sold in competition with interstate milk is permissible under the commerce clause of the Constitution and the Agricultural Marketing Agreement Act of 1937.

(2) Whether the District Court had jurisdiction to enter an injunction against the United States.

In No. 783 the following additional questions are presented:

(3) Whether Sections 8c (18) and 10 (c) of the Agricultural Marketing Agreement Act of 1937 contain unconstitutional delegations of legislative power.

(4) Whether the Act is invalid because of conflict with the federal and Illinois antitrust laws.

(5) Whether Order No. 41 was not issued in compliance with the Act:

(a) Because, although a hearing had been held on a proposed marketing agreement and order, no hearing was held upon a proposal precisely identical to the order as finally issued.

(b) Because the Secretary's findings and proclamation as to the applicable base period were set forth in a separate document instead of being included in the order.

(c) Because the Secretary found that two-thirds of the producers participating in the referendum (as distinguished from two-thirds of all producers) favored the order, and limited participation in the referendum to persons producing milk qualified and available for sale in the marketing area as fluid milk.

(d) Because the Secretary did not include in the marketing area all cities and towns in the immediate vicinity.

(6) Whether the case is moot because the Secretary amended Order No. 41 after this proceeding was instituted.

STATUTE INVOLVED

The statute involved is the Act of May 12, 1933 (48 Stat. 31), as amended May 9, 1934 (48 Stat. 672), as further amended August 24, 1935 (49 Stat. 750), and as reenacted and amended in the

Agricultural Marketing Agreement Act of 1937 approved June 3, 1937 (50 Stat. 246, 7 U. S. C., Supp. V, Secs. 601 c, *et seq.*), herein referred to as the "Act." Section 8 (c) permits the Secretary of Agriculture to issue marketing orders fixing minimum prices for milk and other commodities. Paragraph (1) of that Section provides that orders issued by the Secretary—

> shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

An annotated compilation of the Act is attached to this brief as "Appendix A."

THE ORDER INVOLVED

The regulation involved is Order No. 41, Regulating the Handling of Milk in the Chicago, Illinois, Marketing Area, issued by the Secretary of Agriculture, on August 28, 1939, effective September 1, 1939 (4 Fed. Reg. 3764). The order is printed in the record at pp. 8–22. It is of the same type as is described in the opinion of this Court in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 551–555.

The order contains a finding (R. 10):

> That all milk which was produced for sale in the marketing area is handled in the

> current of interstate commerce, or so as directly to burden, obstruct, or affect interstate commerce in milk or its products; * * *

The order applies to (R. 11):

> * * * such handling of milk in the Chicago, Illinois, marketing area as is in the current of interstate commerce, or which directly burdens, obstructs, or affects interstate commerce, * * *.

The plan of regulation embodied in the order provides [1] for the classification of milk according to its use,[2] and establishes a formula for calculating the minimum price to be paid for each class of milk. The total cost of milk to a handler [3] for each month is arrived at by multiplying the quantity of milk used during the month by the handler in each of the classifications by the applicable minimum price for that class and adding together the totals.

The cost of milk to a handler is not, however, the same as the price paid producers. The price

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[1] A detailed explanation of the terms of the order may be found in the affidavit of Mr. Cladakis, the market administrator, appearing in the record at pp. 24–27, and in the affidavit of Mr. Reed, Acting Chief of the Dairy Section, Department of Agriculture, appearing in the record at pp. 34–40.

[2] The three use classes in the original order were: I—fluid milk; II—cream, ice cream, cottage cheese, and flavored milk; III—other uses (R. 14).

[3] A handler is the processor who purchases the milk from the producers (R. 11).

which is paid to the producers for each delivery period is called the "uniform price" or the "blended price"; this is arrived at by dividing the total cost of milk to all handlers in the market during a delivery period by the total quantity of milk purchased by the handlers.[4]

Payment of the uniform price to all producers supplying the market is effected through what is called the producer-settlement fund, maintained by the market administrator. Each handler whose total cost of milk at the class prices for a particular delivery period is greater than his total payments to producers at the "uniform price" pays such difference into the producer-settlement fund. Each handler whose total cost of milk is less than his total payments at the "uniform price" draws

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[4] The reason for the "uniform price" is described as follows (R. 25-26):

"The plan incorporated in the order for paying producers is simply a plan whereby all producers receive a uniform price for their milk. It is commonly called the equalization plan. Equalization of fluid milk sales is simply an extension of the same plan for paying producers which has always been used by each handler and by cooperatives. If a creamery used 75 percent of its milk as fluid milk and the remainder as cream, it did not pay 75 percent of its producers the fluid milk price and the remaining 25 percent the cream price. Such a method obviously would have been inequitable even if possible. Instead, each producer received the fluid milk price of 75 percent of his milk and the cream price for the remaining 25 percent. In the same way the plan in the order distributes the proceeds from the total sales of milk in the whole market among all producers. Each producer is assured an equitable share of the market, no matter how the handler to whom he delivers milk utilizes such milk."

the amount of such difference from the producer-settlement fund.

STATEMENT

On December 26, 1939, the United States filed its complaint in which it sought to compel Wrightwood Dairy (herein called respondent) to comply with Order No. 41 (R. 2–7). Respondent's answer did not deny that respondent was violating the order (R. 86). The answer averred, however, that respondent's business was entirely intrastate, and that accordingly the statute was not and could not constitutionally be applicable (R. 87–89). The answer further averred, both by way of denial and in the fourth to eleventh defenses (R. 89–99), that for numerous other reasons, summarized in "Questions Presented," Nos. 3 to 5, *supra*, pp. 2–3, the Secretary's order was invalid (R. 89–99). The answer contained a counterclaim praying that the United States, its officers and agents be enjoined from enforcing Order No. 41 against respondent (R. 99–100). Respondent subsequently amended its answer so as to add a "twelfth defense" averring that the case had become moot by reason of an amendment to Order No. 41 (R. 118).

The United States moved for summary judgment on affidavits (R. 105–116). District Judge Woodward denied the motion, but on the basis of the affidavits and pleadings found certain facts to exist without controversy (R. 157). Under Rule 56 (d) of the Federal Rules of Civil Procedure

the facts so specified are to be deemed established for purposes of the case.

The court made the following findings: Respondent was not complying with Order No. 41 (R. 157). Respondent purchased milk from producers within the State of Illinois, processed the milk in Chicago, and sold it in Illinois "in competition with the milk of other handlers in the area" (R. 157–158). None of respondent's milk was physically intermingled with milk which had crossed state lines (R. 158). Prior to the issuance of Order No. 41, 60 percent of the milk sold in the Chicago marketing area was produced in Illinois and 40 percent in Wisconsin, Indiana, and Michigan, and at the time of the findings "over 60 percent" was produced in Illinois (R. 158). There was a genuine question of fact as to whether the Secretary's order had been issued in full compliance with the law (R. 158).

The United States filed motions to dismiss respondent's counterclaim (R. 101) and to strike the third to eleventh defenses of respondent's answer (R. 156). These motions were argued at the beginning of the trial. The court denied the motion to dismiss the counterclaim and the motion to strike the third defense, which raised the interstate commerce question, but granted the motion to strike the fourth to eleventh defenses (R. 244).

At the trial respondent introduced into evidence the complete record of the public hearing conducted by the Secretary prior to the issuance of

the order (R. 200–201).[5] Respondent also introduced in evidence excerpts from the legislative history of the Act (R. 202–217), and a portion of the Government's pleadings (R. 201). Oral testimony was taken with respect to the list of persons permitted to vote in the referendum conducted by the Secretary among producers prior to the issuance of the order (R. 218–231).

At the close of the trial the court stated that the findings made on the motion for summary judgment would be adopted, and that two additional findings would be made, namely, (1) "that the order was issued by the Secretary in full compliance with law and all conditions precedent to the effectiveness of said order have occurred," and (2) "that the business of the defendant was not in the current of interstate commerce and did not burden, obstruct, or in any way affect interstate or foreign commerce" (R. 243, 245–246).

On October 31, 1940, the court filed its findings of fact and conclusions of law (R. 244–247) and entered final judgment dismissing the complaint and granting the respondent the injunctive relief prayed for in the counterclaim (R. 247–248). The Circuit Court of Appeals affirmed (R. 275), on the ground that the commerce clause of the Constitution did not empower Congress to regulate intrastate transactions impinging upon inter-

[5] The volumes of this record have been filed with the Court as original exhibits.

state transactions through "competition only" (R. 274).

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

(1) In holding that respondent was not a handler of milk, as defined in the Act and the order, subject to the provisions of the order.

(2) In holding that the business of distributing milk conducted by the respondent in competition with interstate commerce in milk does not directly burden, obstruct or affect such commerce.

(3) In affirming the decree of the District Court enjoining the United States and its officers from enforcing Milk Order No. 41 against respondent.

(4) In failing to order respondent to comply with said order.

SUMMARY OF ARGUMENT

PART ONE

I

A. In *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, this Court recognized the authority of Congress to regulate wholly intrastate milk which directly affected the marketing of interstate milk, and many lower courts have also applied the Act to intrastate milk competing with interstate milk. These decisions are directly in point here.

B. The exemption from minimum-price regulation of intrastate handlers who compete with dealers in milk coming from other states seriously dis-

criminates against and injures the latter, and tends to render ineffective the regulation as applied to interstate commerce. In such circumstances Congress has power under the commerce clause to regulate the intrastate transactions as well as the interstate.

C. Respondent contends that Congress did not intend the Act to apply to intrastate transactions. The statute and marketing order apply to the handling of milk "in the current of * * * or which directly * * * affects, interstate or foreign commerce." The expression "directly affects" shows that Congress meant to employ all of its Constitutional power over the subject matter. The legislative history of the Act points to the same conclusion. The most that can be said for respondent's viewpoint is that the legislative history is ambiguous; but this would not be enough to overcome the plain language of the law.

II

The District Court had no jurisdiction to issue an injunction against the United States by way of counterclaim since the United States has not consented to be sued. *United States* v. *Shaw*, 309 U. S. 495.

Part Two

I

There is no merit in respondent's contention that the Secretary failed to comply with the provisions of the Act in issuing Order No. 41.

1. The statute does not require that the final order be precisely identical to the proposal upon which the hearing is held. Section 8c (10) of the Act merely requires that the order regulate in the same manner the same classes of persons. The obvious purpose of this provision is to insure that all persons affected by the order have had an opportunity to be heard on the scheme of regulation.

2. The Secretary, by separate proclamation, adopted the base period permitted by Section 8e of the Act because he found that satisfactory statistics were not available for the base-period provided in Section 2. There is no requirement in the statute that the Secretary's finding and proclamation must be contained in the order itself. Although we believe that the Secretary's finding under Section 8e is not reviewable, the evidence taken at the administrative hearing supports the finding.

3. The Secretary found on the basis of a referendum conducted pursuant to Section 8c (19) that the Order was approved or favored by two-thirds of the producers who participated in the referendum. That finding is sufficient to meet the requirements of Section 8c (9), particularly in view of the provisions in Section 8c (19) that the affirmative vote of two-thirds of those participating must be held to meet the statutory requirements in regard to producer approval. The Sec-

retary did not err in refusing to allow persons producing milk solely for manufacturing purposes to participate in the referendum. The order regulates the handling of fluid milk and is for the benefit of producers engaged in the production of milk for consumption as fluid milk. Since other producers were not concerned in the result of the referendum, there was no reason to allow them to participate.

4. Respondent was not discriminated against by the fact that cities and towns adjacent to the marketing area were not included within the area. All handlers selling milk within the marketing area must pay the prices fixed by the order. However, if a handler sells part of his milk outside the area, he is only required to pay the prevailing prices in the area in which the milk is sold. The Secretary had to draw the line at some point, and the evidence taken at the administrative hearing amply supports his decision in this case.

II

Sections 8c (18) and 10 (c) do not contain invalid delegations of legislative power. Nor does it appear that any orders or regulations issued under them have been in any way prejudicial to respondent.

III

The Act is not void because in conflict with the federal and Illinois antitrust laws.

IV

The case is not rendered moot by reason of the amendment to Order No. 41.

ARGUMENT

PART ONE

I

THE INTRASTATE DISTRIBUTION OF MILK IN COMPETITION WITH INTERSTATE COMMERCE IS SUBJECT TO REGULATION UNDER THE AGRICULTURAL MARKETING AGREEMENT ACT

The court below held that it would be unconstitutional to subject respondent's intrastate transactions to federal regulation. Although respondent has not abandoned this constitutional contention, it places greater emphasis upon the argument that Congress did not intend the statute to apply to such transactions. We shall show that these contentions are both foreclosed by decision and patently unsound.

A. THE CASES INVOLVING MILK ORDERS DISPOSE OF BOTH THE CONSTITUTIONAL AND STATUTORY QUESTIONS

The cases which deal with and uphold the applicability to intrastate milk of marketing orders issued under the same statutory provisions as are involved here are directly in point on both the constitutional and the statutory questions.

In *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 568, which involved the mar-

keting order for the New York area, this Court stated:

> Nor is any question raised as to the power of the Congress to regulate the distribution in the area of the wholly intrastate milk. It is recognized that the federal authority covers the sales of this milk, as its marketing is inextricably intermingled with and directly affects the marketing in the area of the milk which moves across state lines.

Respondent has characterized the above statement as an "erroneous" or "gratuitous" dictum,[6] and the court below declared it to be an "inapposite remark" (R. 272). It is true that other expressions in the *Rock Royal* opinion show that this Court assumed that all of the milk involved moved through the channels of interstate commerce (307 U. S., at 540, 541, 568). The record in the case shows, however, that, although the issue was not pressed in this Court, the defendant Central New York Cooperative Association, Inc., did challenge the power of Congress to regulate it on the ground that its activities were entirely intrastate and that its milk was usually handled entirely intrastate.[7]

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[6] See respondent's brief in the Circuit Court of Appeals, pp. 40, 35.

[7] The answer of the Central New York Cooperative Association, Inc., alleged that all of the milk handled by it was produced and sold in the state of New York and that none of it crossed state lines or was mixed with other milk which had crossed state lines (October Term, 1938, No. 771, Transcript of Record, p. 80). The stipulation on which the case

Whether or not this Court's remark in the *Rock Royal* case was dictum, we submit that it certainly was not erroneous. That it was a deliberate statement of the correct rule was the view of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Adler's Creamery*, 107 F. (2d) 987, 110 F. (2d) 482, certiorari denied, 311 U. S. 657. That case involved the applicability of the New York milk order to a company in exactly the same position as is respondent here. The Adler Company handled milk produced and transported entirely within the State of New York and not commingled with milk from other states. About half[8] of the milk sold within the area came from outside the state and was sold in competi-

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was tried substantiated these allegations, except that it showed that while the Association's milk usually followed a route to New York City entirely within the state of New York, prior to October 1, 1938, the tank trucks often passed through the state of New Jersey en route to New York City, and that when tank trucks were not available the milk was shipped by rail on railroads running through the state of New Jersey (*id.*, pp. 265–267).

[8] The opinion in the *Rock Royal* case indicated that at that time approximately two-thirds of the milk produced for the New York area moved in interstate commerce (307 U. S., at 551–552). Respondent attempts to distinguish the cases involving the New York order on the ground that only 40 per cent of the milk in the Chicago area came from outside the state. The difference between 40 per cent interstate and 50 per cent or 66⅔ per cent is obviously immaterial. Cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U. S. 453 (37 per cent interstate commerce); *National Labor Relations Board* v. *Fainblatt*, 306 U. S. 601.

tion with the intrastate milk. The court said (107 F. (2d), at 989–990):

> We interpret the decision in *United States* v. *Rock Royal Co-operative, Inc.*, supra, to mean that milk which has not crossed a state line but which is distributed in a marketing area in such a way that its marketing is merely part of what is from the public standpoint one marketing operation which includes interstate milk may be the subject of federal regulation whenever that is necessary to prevent a direct burden upon or obstruction to the coming of interstate milk into the marketing area. * * * What is, or is likely to be, such a burden or obstruction must be determined from the nature of the need for protection and where that need has been created by lawful marketing control of interstate commodities the scope of such protection covers the field, when necessary, of the similar marketing control of intrastate commodities. *Currin* v. *Wallace*, 306 U. S. 1, 59 S. Ct. 379, 83 L. Ed. 441; *Mulford* v. *Smith*, 307 U. S. 38, 59 S. Ct. 648, 83 L. Ed. 1092. Accordingly, the facts justifiably found below are sufficient to require us to hold that the appellant is a handler of milk who is bound to comply with the provisions of Order No. 27.

Every district court which has passed upon the question, apart from the instant case, has also come to the conclusion that intrastate milk com-

peting with interstate is subject to milk orders issued under the Agriculture Marketing Agreement Act. *United States* v. *Krechting,* 26 F. Supp. 266 (S. D. Ohio); *United States* v. *Andrews,* 26 F. Supp. 123 (D. Mass., Judge Brewster); *United States* v. *H. P. Hood & Sons,* 26 F. Supp. 672 (D. Mass., Judge Sweeney); *United States* v. *Schwarz et al.,* Civil Action No. 1480 (N. D. Ill.), decided January 30, 1941 (Judge Barnes).

B. CONGRESS HAS THE POWER UNDER THE COMMERCE CLAUSE TO REGULATE INTRASTATE TRANSACTIONS WHICH COMPETE WITH INTERSTATE

The district court found, and it is uncontroverted, that respondent's milk is sold "in competition with the milk of other handlers in the area" (R. 245), and that approximately 40 per cent of the milk distributed in the area comes from outside of Illinois (R. 246).[9] It is also apparent from these facts that in the purchase of milk from producers respondent competes with other handlers

[9] The finding was that "less than 40 per cent is brought in" from other states and that 40 percent was brought in "prior to the issuance of Order No. 41" (R. 246). The record shows that the proportion of interstate milk was approximately 40 percent (R. 33–34; Def. Ex. 4 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 2, pp. 10–12), although an affidavit filed by respondent's president states generally that "he is informed and believes" that "less than 40 percent of the milk" is imported into Illinois (R. 45).

who buy their milk both in interstate and in intrastate commerce.

The term "competition" as used in the findings describes a dynamic and frequently complex economic relationship. The finding that the milk processed by respondent competes with other milk, including milk from outside the state, means that respondent and other handlers are struggling as "rivals for the same trade." *Lipson* v. *Socony Vacuum Corporation*, 87 F. (2d) 265, 270; *Schill* v. *Remington-Putnam Book Co.* (Md.), 17 Atl. (2d) 175, 178 (1941); 12 C. J. 237. Where such rivalry exists, it is inevitable that the imposition of restrictions upon some of the protagonists and not upon others will greatly injure the business of those whose freedom of action is restricted.

Although we believe that the unchallenged finding of "competition" necessarily carries with it this connotation [10] without reference to other portions of the record, it may be noted that the record does show in more detail that both the handlers of interstate milk and the farmers who produce it will be harmed if intrastate milk is exempt from regulation. The uncontroverted affida-

[10] We assume that the district court meant the word "competition" to have its ordinary significance. The record upon which the Court's findings were based (see Note 11, *infra*) required that the term have this meaning.

vits upon which the finding was based [11] declared (R. 34, 39):

> The plan of regulation prescribed by the Agricultural Marketing Agreement Act of 1937 and Order No. O–41, issued pursuant thereto, is such that it must, by reason of the economic forces inherent in it, be applicable to all handlers in the market, regardless of whether their marketing of milk is wholly intrastate in character or interstate in character. If handlers whose marketing of milk in the marketing area is wholly intrastate in character were exempted from compliance with Order No. O–41, and the plan of regulation were applicable only to handlers in the market whose marketing is interstate in character, the latter handlers would suffer serious discrimination. * * *
>
> * * * * * *
>
> Those handlers who are participating in the equalization program cannot continue to meet the competition of noncomplying handlers who are receiving their milk at a

[11] At the close of the trial the district court adopted, in so far as the facts showing interstate commerce and competition were concerned, the findings previously made on the motion for summary judgment (R. 243; cf. R. 245–246 and 159–160). No additional evidence had been introduced on this point (although the record before the Secretary subsequently introduced in another connection contained material pertinent to the commerce issue). The undisputed allegations in the affidavits on the motion for summary judgment (R. 24–41, 43–60, 112–116, 142–143) are thus the record upon which the court's findings on this issue were based.

> lower cost, and sooner or later destructive competition will set in and prices will be reduced to ruinously low levels. The cost of competition is usually borne by producers and thus the supply and quality of milk to consumers is greatly endangered.

An economic analysis of the milk-marketing problem,[12] introduced as an exhibit in the record before the Secretary of Agriculture (Def. Ex. 4 (Original), Ex. 2, pp. 75–76) states:

> Producers selling milk to handlers competing with the handler who sells cut-rate milk find that they also must reduce prices in order that the handlers purchasing their milk may compete successfully and maintain their share of the market. Thus, the entire price structure is threatened, and it is probable that if the price is lowered due to such competitive conditions, no group will have gained a permanent advantage and all producers will have suffered severe losses due to such ill-advised practices. * * *

The inequality and unfairness of a system of regulation not uniformly applicable to all competitors was also stressed by witnesses opposing issuance of a milk order at the hearing before the Secretary; they assumed that such an order could not be uniformly enforced, and that they would be

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[12] Such evidence may properly be considered. *Opp Cotton Mills* v. *Administrator*, 312 U. S. 126, 154–155.

unable to withstand the competition of those who did not comply.[13]

It is, of course, obvious that a handler not complying with the minimum price system established under an order will have advantages over his competitors. He will be able to pay the producers less than his rivals are required to pay,[14] and thus will be in a position to undersell them on the market. In order to protect themselves competitors will seek to reduce the amounts they pay producers, and inevitably the entire price structure, interstate and intrastate, will collapse. A price order applicable only to interstate transactions would thus either be unworkable or would cause grievous injury to and discrimination against the interstate dealings of those subjected to it. This seems to have been conceded by the court below, when it declared (R. 274):

> * * * Unfortunately, if the defendant is not subject to the regulations of Order

[13] Def. Ex. 3 (Original), pp. 281–282, 316–317, 360–361. Testimony of these witnesses was based on experience under a license issued under the predecessor to the statute here involved.

[14] An unregulated handler selling mainly Class I milk could pay producers substantially less than the price received by other producers for the higher priced Class I milk, and yet pay as much as or more than the "uniform price" to all producers, which is the average price for Classes I, II, and III combined. See the illustration given at R. 39. Such a handler would have an advantage over others in the sale of Class I milk, and would force his competitors to seek reduced prices from producers in order to retain their markets.

> No. 41, the result may well be that the effective sanction of the order will wither before the force of competition, the morale of the market will disintegrate, and this attempt at solution of the problem by the National Government will fail. * * *

The existence of competition between interstate and intrastate commerce thus presents a situation where Congress will not be able effectively to regulate prices for interstate sales of milk from producers to handlers unless intrastate sales are similarly controlled.

The Court has frequently held that the commerce power extends to the regulation of intrastate acts when necessary to make the control of interstate commerce effective. *Shreveport Case,* 234 U. S. 342; *Railroad Commission of Wisconsin* v. *Chicago B. & Q. R. Co.,* 257 U. S. 563; *Chicago Board of Trade* v. *Olsen;* 262 U. S. 1; *Schechter Corp.* v. *United States,* 295 U. S. 495, 544–546; *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.,* 301 U. S. 1, 36–38; *Currin* v. *Wallace,* 306 U. S. 1; *Mulford* v. *Smith,* 307 U. S. 38; *United States* v. *Darby,* 312 U. S. 100, 121. This principle is merely an application of the basic constitutional doctrine, embodied in the "necessary and proper" clause but implied in any event (*McCulloch* v. *Maryland,* 4 Wheat. 316), which permits Congress to choose the means appropriate to the accomplishment of a purpose within the federal power, even though the means

itself might not expressly fall within the powers granted. *United States* v. *Darby*, 312 U. S., at 121, and cases cited.

The existence of competition between interstate and intrastate commerce, such as in the case at bar, has been regarded and treated as presenting the typical, as well as perhaps the simplest, situation to which the doctrine is applicable. In the *Shreveport Case*, 234 U. S. 342, the federal regulation of intrastate railroad rates was upheld precisely because of competitive discrimination against interstate rates. See also, *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R. Co.*, 257 U. S. 563.[15] The passage from the *Nock Royal* case (quoted, *supra*, p. 15), whether or not dictum, which states that the federal authority over intrastate milk was recognized without question is strong indication that neither the Court nor the litigants in that case had any doubt as to the applicability of the *Shreveport* doctrine to the marketing of milk. Also directly in point is the statement from the dissenting opinion of Mr. Justice Cardozo in *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 329,[16] with respect to the fixing of minimum prices for coal—

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[15] Respondent's suggestion that the principle applicable to agencies of transportation cannot be given effect elsewhere is clearly unsound. Cf. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 42. Many of the cases referring to the doctrine are not concerned with transportation.

[16] The majority of the Court in the *Carter* case did not pass on the price-fixing provisions of the Coal Act. The

> Within rulings the most orthodox, the prices for intrastate sales of coal have so inescapable a relation to those for interstate sales that a system of regulation for transactions of the one class is necessary to give adequate protection to the system of regulation adopted for the other. * * *

That the discrimination against interstate commerce resulting from the failure to control competing intrastate transactions constitutes a "direct effect"[17] upon interstate commerce subject to federal regulation was specifically recognized in *Schechter Corp.* v. *United States*, 295 U. S. 495, 546, upon which respondent mainly relies;[18] the Court there stated that—

> Direct effects are illustrated by the railroad cases we have cited, as *e. g.*, * * * the

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views expressed in the opinion of Mr. Justice Cardozo were approved by this Court in *Sunshine Coal Co.* v. *Adkins*, 310 U. S. 381.

[17] Respondent incorrectly states (Brief in opposition, p. 2) that we do not contend that its milk directly burdens or affects interstate commerce where "the point of impingement of the intrastate transaction is one of competition only." On the contrary, we think it clear that the existence of a competitive relationship affords the best illustration of a "direct effect."

[18] The *Schechter* case did not, of course, involve competition between interstate and intrastate dealings. The Government sought to show that local practices affecting competition between intrastate merchants selling at wholesale or retail in New York City affected the general price structure in the industry and thereby affected commerce in the poultry coming into New York City from other states. This Court regarded such an effect as indirect.

fixing of rates for intrastate transportation which unjustly discriminate against interstate commerce.

In *Federal Trade Commission* v. *Bunte Bros.*, 312 U. S. 349, a case involving the construction of a statute which was not in terms applicable to transactions *affecting* interstate commerce, this Court implied that the constitutional power of Congress (as distinguished from the statute before the Court) extended to the control of intrastate sales competing with interstate (p. 355); the dissenting opinion stated that the exercise of power involved in that case was "admittedly constitutional" (p. 358).

The court below was peculiarly unperturbed by the fact that its view as to the scope of federal power left a hiatus where neither state nor nation could effectively function (R. 274). The design of the framers of our Constitution was that local matters were to be left to the states, but that subjects which the states were separately incompetent to handle were to be subjected to the control of the nation.[19] That the enumerated powers, including particularly the commerce clause, were intended to be construed so as to avoid any hiatus is clear both from the history of the Constitution and from the decisions of this Court.[20]

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[19] See Stern, *That Commerce Which Concerns More States Than One*, 47 Harv. L. Rev. 1335.

[20] *Gibbons* v. *Ogden*, 9 Wheat. 1, 194–195; *Minnesota Rate Cases*, 230 U. S. 352, 398; *Carter* v. *Carter Coal Co.*, 298 U. S.

C. THE STATUTE ANTHORIZES THE SECRETARY OF AGRICULTURE TO REGULATE INTRASTATE TRANSACTIONS WHICH COMPETE WITH INTERSTATE

1. *The language of the Act.*

Respondent seems to argue that the Act was not intended to apply to intrastate milk, even where such regulation would be constitutional. The language of the statute plainly refutes this contention. Section 8c (1), which authorizes the issuance of marketing orders, specifically provides that—

> Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

The language used, and particularly the phrase "directly * * * affects," is taken from decisions of this Court defining the scope of congressional power over intrastate transactions. *E. g., Schechter Corp.* v. *United States,* 295 U. S. 495, 546. The terms employed are those which Congress has frequently used in enacting commerce regulations which go to the limits of its constitutional power. Cf. Bituminous Coal Act of 1937, Secs. 4, 4–A, 50 Stat. 72, 15 U. S. C., §§ 831,

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238, 326 (dissent); *Sunshine Coal Co.* v. *Adkins,* 310 U. S. 381, 396; *Head Money* Cases, 112 U. S. 580, 593; Story, *Commentaries on the Constitution* (5th Ed.), Sec. 1082.

834; National Labor Relations Act., Secs. 10 (a), 2 (7), 49 Stat. 449, 29 U. S. C., §§ 160, 152 (7); see *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S., at 30–31.

The use of the expression "directly affects" thus demonstrates that Congress intended that the Secretary possess all the constitutional power of the Federal Government over the subject to be regulated. This also appears from the committee reports, which expressly state that (H. Rep. 1241, S. Rep. 1011, 74th Cong., 1st Sess., R. 208):

> * * * the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.

The reports further declare (R. 207) that—

> The powers to be exercised under the proposed bill are confined within the limitations upon the Federal Authority over interstate commerce as expressed by the Supreme Court in the *Schechter* case and other cases.

Respondent appears to argue (br. in opp., p. 12) that the statute authorizes the Secretary to control only products which are in the current of interstate or foreign commerce and which *also* directly burden, obstruct, or affect interstate commerce. The construction suggested completely

ignores the word "or," which shows that the two expressions are intended to be in the alternative. Indeed, the expression interpreted without the "or" is scarcely susceptible of an intelligent meaning.[21]

2. *Legislative history.*

Respondent relies on the committee reports and debates upon the floor of Congress to show that Congress did not intend that marketing orders be applicable to intrastate transactions competing with interstate. We submit that the legislative history tends to support a literal construction of the language of the Act, rather than the contrary. The most that can be said from respondent's viewpoint is that the legislative history is ambiguous. In such circumstances, when the terms of a statute are as clear as in the instant case, little weight can be given legislative history.

(a) *The committee reports.*—Section 8 (3) of the Agricultural Adjustment Act of 1933, 48 Stat. 31, 35, provided for the issuing of licenses to per-

[21] Respondent also relies on Section 10 (i) of the Act as amended in 1935 (49 Stat. 767–768) which provides that "upon the request of the duly constituted authorities of any State," the Secretary of Agriculture shall cooperate with such authorities in the formulation and administration of joint federal and state programs. This action, which applies to the entire Agricultural Adjustment Act and not merely to the marketing order provisions, obviously does not narrow the powers expressly granted to the Secretary in Section 8c (1). See H. Rep. 1241, 74th Cong., 1st Sess., pp. 22–23.

sons engaged "in the handling, in the current of interstate or foreign commerce, of any agricultural commodity or product thereof, or any competing commodity or product thereof." Section 8 (2) of the 1933 Act, as amended April 7, 1934, 48 Stat. 528, provided that the Secretary could enter into marketing agreements with persons "engaged in the handling of any agricultural commodity or product thereof, in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." These provisions were replaced in the 1935 amendments to the Agricultural Adjustment Act by the language quoted above from Section 8c (1) (49 Stat. 750, 753), which was taken over without change into the Agricultural Marketing Agreement Act of 1937, 50 Stat. 246. Thus it is to the 1935 amendments that respondent's contentions on legislative history are addressed.

The first bills introduced in 1935 eliminated the differences between Sections 8 (2) and 8 (3) and authorized the Secretary to issue licenses to persons "engaged in the handling of any agricultural commodity or product thereof, or any competing commodity or product thereof, in the current of or in competition with or so as to burden, obstruct, or in any way affect, interstate or foreign commerce." [22]

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[22] S. 1807, 74th Cong., 1st Sess.; S. Rep. 548, 74th Cong., 1st Sess., pp. 5–6. The report stated that, "Under the present wording of this section [Section 8 (3) of the 1933 Act]

These bills were still before Congress at the time the *Schechter* case was decided on May 27, 1935. After the *Schechter* decision the bills were redrafted in order to avoid constitutional difficulties presented by the *Schechter* opinion (79 Cong. Rec. 9478). As a result, the present language was adopted, making the Act applicable to handling "in the current of * * * or which directly * * * affects interstate or foreign commerce. The reports of both House and Senate Committees (S. Rep. No. 1011, H. Rep. No. 1241, 74th Cong., 1st Sess.) declared that (R. 207–208)—

> The scope of orders under the proposed section 8c is limited to the regulation of the handling of the specified commodities in the current of interstate or foreign commerce or to the handling thereof which directly burdens, obstructs, or affects inter-

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it has been possible to argue that Congress did not intend to vest the Secretary with power to license handlers who did not operate in the current of interstate commerce, even though their operations could be shown to burden and obstruct interstate commerce. It is, of course, not intended to authorize the licensing of persons handling goods only in intrastate commerce except where such handling burdens, obstructs, or affects interstate commerce. The language contained in the amendments will, however, make it clear that the full extent of the Federal power over interstate commerce is intended to be vested in the Secretary in connection with the issuance of licenses * * *." Substantially identical language was used in explaining the same amendment which was contained in H. R. 5585, H. R. 7713, and H. R. 8052 pending contemporaneously before the House of Representatives. See H. Rep. 808 and H. Rep. 952, 74th Cong., 1st Sess.

> state or foreign commerce in such commodities or products thereof. Section 8 (2) of the Agricultural Adjustment Act now authorizes the Secretary of Agriculture to enter into marketing agreements with processors and others engaged in the handling of any agricultural commodity or product thereof "in competition with" interstate or foreign commerce. This phrase has been omitted from the proposed section 8c (1) of the bill which deals with orders, as well as from the proposed section 8b, which deals with marketing agreements, because the proposed language makes it clear that the full extent of the Federal power over interstate and foreign commerce and no more is intended to be vested in the Secretary of Agriculture in connection with orders.

Respondent insists that the elimination of the phrase "in competition with" shows that Congress did not intend the Act to apply to intrastate transactions competing with interstate, even though such transactions might validly be reached under the commerce clause. But we believe that the reports as a whole show that Congress was still trying to exert all of its constitutional authority under the commerce clause, and that the expression referred to was deleted out of caution in order to make it clear that Congress was not going beyond the formula approved in the *Schechter* case. In the *Schechter* decision the Court had held that the power of Congress over intrastate

activities extended to "direct effects" upon interstate commerce, but no further (295 U. S., at 546, 548). The opinion reviewed prior decisions in such manner as to indicate that all intrastate activities previously regulated, including those which had affected interstate commerce through competition (see p. 25, *supra*), had directly affected interstate commerce. Congress thus could reasonably have assumed that if the effects of intrastate competition upon interstate commerce were "direct" the deleted phrase was unnecessary to subject such competition to the statute; if such effects were indirect, the phrase in question would have been futile.

(b) *The congressional debates.*—Respondent also relies on the congressional debates, excerpts from which have been included in the printed record (R. 214–217), as manifesting an intention that intrastate transactions competing with interstate were not to be regulated. But the portions of the debates which respondent has included in the record are incomplete, and do not give an accurate picture of what was said on the floor.

It is true that Senators Smith[23] of South Carolina and Tydings of Maryland indicated that

[23] Senator Smith was chairman of the Senate Committee on Agriculture and Forestry which reported the bill. His remarks were addressed to the earlier draft of the bill, with respect to which he admitted that he did not like the language used any more than he did the language of the "Transportation Act" (79 Cong. Rec. 8240). The final draft was explained on behalf of the Committee by Senator Murphy (79 Cong. Rec. 11134–11140).

they did not intend intrastate commerce in milk to be regulated [24] (79 Cong. Rec. 8239–8242, 11135–11138). But a number of other Senators, including Senator Murphy, who explained the bill on behalf of the committee (79 Cong. Rec. 11134–11140), indicated doubts that the views of Senator Smith and Senator Tydings could be reconciled with the language in the proposed bill.[25] Senator Shipstead stated (79 Cong. Rec. 11135):

> It seems to me that it must be plain that this language is inserted here to affect the price of milk in intrastate commerce if and when it becomes directly burdensome or obstructs or affects the price of milk in interstate commerce.

Senator Dickinson declared that (*id.*, 11136)—

> The very purpose of the "weasel" words to which the Senator from Idaho has just referred, is to do the very thing the Senator from Maryland has said should not be done.

The intermingling problem was considered in a colloquy between Senators Borah and Murphy (*id.*, 11138):

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[24] Senator La Follette also stated that he understood that intrastate shipments were not being regulated, but it does not appear that he was thinking of the interstate-intrastate competition problem. He also stated that, "The court would have to find the fact as to whether or not it actually flowed in interstate commerce *or tended to obstruct* interstate commerce" (79 Cong. Rec. 11135). [Italics supplied]

[25] Senators Byrd (79 Cong. Rec. 8240), Shipstead (*id.*, 11135), Dickinson (*id.*, 11136), Borah (*id.*, 11138), Murphy (*id.*, 11138, 11139). Senators Murphy and Shipstead were members of the Committee on Agriculture and Forestry.

Mr. BORAH. * * * I think, though, if the Agricultural Department were dealing with an interstate commodity which was so intermingled with intrastate commerce that it could not be separated, and they could not formulate a line of demarcation, that they would be justified in dealing with the intrastate portion of the commodity just as the Supreme Court held in the railroad case that where the interstate business and the intrastate business were so intermingled and the intrastate portion of it was so much a part of the interstate business that the two could not be separated, the Congress would have a right to that extent to control intrastate business.

Mr. MURPHY. At that point, will the Senator apply the principle just voiced to the condition of the Boston milk market, where 25 percent of the production is intrastate and 75 percent, necessary for the use of the people of Boston, is brought in from outside the State, in interstate commerce? Would he not think under such a condition, the intrastate and the interstate commodities being so completely commingled, that on the ground of the intrastate portion burdening interstate commerce, an order would be justified?

Mr. BORAH. The rule, as I understand, is that the Congress has the right fully and completely to regulate interstate commerce, and if, in exercising that right fully and completely to regulate interstate commerce, it becomes necessary by reason of the intermingling of interstate and intrastate com-

merce to affect intrastate commerce, it may do so.

Senator Murphy further stated, on behalf of the committee, that (*id.*, 11139)—

> * * * The position of the committee in respect to these amendments is that intrastate commerce may burden or affect interstate commerce and that consequently this is a constitutional enactment under the decision of the Court in the Shreveport case.

Although no clear picture of "the intention" of the Senate can be drawn from the debate in view of the conflicting positions taken by different Senators, this is not true of the debates in the House.[26] Representative Cooley, one of the members of the House Committee on Agriculture, after referring specifically to the doctrine of the *Shreveport Case*, declared that (79 Cong. Rec. 9485)—

> * * * It seems obvious that in these interstate milk markets the fixing of minimum producer prices for interstate milk could not be effective without fixing equivalent prices for intrastate milk which is in direct competition with interstate milk, and the fixing of minimum producer prices for interstate milk alone would clearly discriminate against such milk.

There was also considerable discussion in the House with respect to the status of intrastate

[26] The House debates are not included in respondent's excerpts from the legislative history.

and interstate milk in Chicago. Representative Halleck of Indiana was particularly interested in the relationship between Indiana and Illinois milk sold in the Chicago marketing area. The explanation of Representative Andresen, of the Committee on Agriculture, was that if a federal marketing area were established, the order provisions would affect all handlers if the law could constitutionally be applied to them; he repeatedly asserted that the question of whether the Act could apply under such circumstances was a constitutional one "to be determined by the court" (79 Cong. Rec. 9479–9480).[27]

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[27] The colloquy on this question reads as follows (79 Cong. Rec., 9479–9480):

"Mr. HALLECK. May I ask the gentleman one further question? Take the case of a milk dealer in the city of Chicago who purchases milk from producers in the State of Illinois. Is it the sentiment of the committee that that man would be subject to the orders as provided for in these amendments?

"Mr. ANDRESEN. If a marketing area were set up in Cook County or in Chicago, then the order provisions would affect all handlers within that marketing area. There, again, we come to the question of the constitutionality of this provision, or whether or not the milk that is sold by a farmer in Illinois to the handler within a marketing area in Chicago is in interstate commerce or not.

"Mr. HALLECK. Was it not the sentiment of the committee that that would be a purely intrastate transaction in the light of the Schechter decision, which would take the transaction without the realm of Federal regulation?

"Mr. ANDRESEN. If there were no marketing area set up, of course, it would be purely an intrastate transaction, but if the Federal Government goes in and sets up a marketing area and issues orders for the handlers in that area, of course,

This discussion shows that although there may have been doubt as to what the courts would hold, the House intended that if it were constitutional to do so the bill should apply to intrastate handlers competing with interstate. This supports

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it would be a legal question as to whether or not the man who dealt in Illinois would come within the provision.

"Mr. HALLECK. Assuming that the milk dealer in Chicago who bought his milk from producers in the State of Illinois would not be subject to the orders, on the theory that he was engaged in a transaction which was wholly intrastate, and then assume the case of another milk dealer in the city of Chicago who was buying his milk in my State of Indiana, he would, of course, be subject to these orders, and what would be the effect as between the two, if the dealer buying his milk from producers in Indiana had to pay a stipulated price, which was fixed in the order, while the other dealer buying his milk in the State of Illinois would buy it at a lesser price?

"Mr. ANDRESEN. If there were no State law regulating the price of milk, similar to ones they have in the State of New York and in some other States—I do not know whether there is one in Illinois or not—then, of course, it would become a constitutional or legal question to determine whether or not the dealer living in Chicago or in Illinois would have to pay the same price to his Illinois farmer as he did to the farmer living over in Indiana, and I think this is a question that will have to be determined by the court.

* * * * * *

"Mr. MOTT. * * * My question is this. If I am a milk handler in Chicago and you produce your milk some place in the State of Illinois, as the situation has been stated here, and our transactions in milk as producer and dealer are entirely within the State of Illinois, do we come under the provisions of this bill?

"Mr. ANDRESEN. If there is no marketing area or marketing territory set up, you do not. If there is and the law is constitutional, you do. Now, that is a question for the courts."

the interpretation which we have suggested for the quoted passage from the committee reports—that Congress was not clear as to what the courts would hold to be a direct effect upon interstate commerce, but that the complete exercise of the federal commerce power was intended.

In the light of the explanation in the House, the disagreement in the Senate, and the language of the committee reports, we submit that the legislative history of the Act is more consistent with a literal reading of the terms used than with the forced interpretation advocated by respondent. At most, the legislative history is ambiguous. Such ambiguity is obviously insufficient to warrant a construction of the statute contrary to its plain terms. When statutory language is clear and legislative history ambiguous, the latter does not prevail.

II

THE DISTRICT COURT HAD NO JURISDICTION TO ISSUE AN INJUNCTION AGAINST THE UNITED STATES

Respondent, by way of counterclaim, sought and obtained an injunction forbidding the enforcement of the statute against it by the United States, its officers and agents (R. 99–101, 247–248). In view of the court's refusal to enforce the marketing order against respondent, the issuance of the injunction is of little practical significance. Nevertheless, the granting of an injunction against the Government constituted such fundamental error

that we feel it necessary to bring the point to the Court's attention.

Injunctions cannot, of course, be granted against the United States without its consent, and no statute permits the issuance of an injunction in the circumstances of this case. The fact that the United States originally instituted this action does not mean that Congress has consented to the granting of affirmative relief against the United States by way of counterclaim. "Generally speaking, a claim that would not constitute a cause of action against the sovereign cannot be asserted as a counterclaim." *United States* v. *Shaw*, 309 U. S. 495; *United States* v. *The Thekla*, 266 U. S. 328. "The objection to a suit against the United States is fundamental, whether it be in the form of an original action or a set-off or a counterclaim. Jurisdiction in either case does not exist unless there is specific congressional authority for it." *United States* v. *Shaw, supra; Nassau Smelting Works* v. *United States*, 266 U. S. 101.[28]

Part Two

Wrightwood Dairy Company, the respondent in No. 744, is the cross-petitioner in No. 783. In this part of our brief we shall endeavor to antici-

[28] Rule 13 (d) of the Federal Rules of Civil Procedure provides that:

"These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims or to claim credits against the United States, or an officer or agency thereof."

pate the arguments which will be advanced in support of the questions presented by the cross-petition. To avoid confusion we shall continue to refer to the company as the respondent.

The issues presented by the cross-petition arise in part from the rejection by the trial court of certain arguments advanced by respondent in opposition to the Government's main case, and in part from the ruling of the trial court striking certain of the separate defenses set up in the answer to the complaint (R. 244). All of the issues relate to the validity of the order or the statute, and presumably could have been raised without a cross-appeal. Since they present either pure questions of law with respect to which evidence need not be considered, or questions of fact to be determined on the basis of the evidence of record, including the transcript of the proceedings before the Secretary,[19] they may be decided upon the record before this Court. Consequently, we shall deal with the issues on their merits without reference to the manner in which they were raised.

I

THE ORDER WAS ISSUED IN FULL COMPLIANCE WITH THE APPLICABLE STATUTORY PROVISIONS

In this case the Secretary's findings and order were promulgated in the same manner and are

[19] The volumes of the record before the Secretary were introduced by respondent as original exhibits. Oral testimony was also taken (R. 218–231), but it does not appear to bear upon any of the issues presented here.

based on the same type of evidence as the findings and orders approved by this Court in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, and *H. P. Hood & Sons* v. *United States*, 307 U. S. 588. Before discussing the various objections raised by respondent, we shall outline briefly the procedural steps leading up to the issuance of the order.

Pursuant to the provisions of Sec. 8c (3) of the Act, the Secretary, on June 9, 1939, gave notice of a hearing on a proposed marketing agreement and order to be held in Chicago, Illinois, beginning June 26, 1939.[30] The hearing was held in accordance with the notice.[31] Six hundred ninety-three pages of testimony were taken and many exhibits were offered in evidence.

On August 18, 1939, the Secretary submitted to the industry a tentatively approved marketing agreement for signature of handlers (R. 63); and on August 19, 1939, he submitted to all producers known to be qualified to participate in a refer-

[30] The notice was published in the Federal Register (4 Fed. Reg. 2366) and given wide publicity (see Def. Ex. 1 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 1); copies with pertinent data attached, were sent by mail to respondent (see p. 6 of list attached to affidavit of Ray Harris forming part of Ex. 1, Transcript of Record before the Secretary of Agriculture, Def. Ex. 1 (Original)) and other milk distributors, producers' associations, and persons who might be interested.

[31] See Def. Ex. 3 (Original).

endum a ballot upon which to indicate whether they approved or disapproved of the issuance by the Secretary of an order ~~regulating~~ the handling of milk in the Chicago, Illinois, marketing area, in the same manner as provided in the tentatively approved marketing agreement (R. 78–80).

The vote in the referendum was overwhelmingly in favor of the order.[32] Consequently, on August 24, 1939, the Secretary made the determinations required under Section 8c (9) of the Act. These determinations were approved by the President on August 26, 1939.[33]

On August 28, 1939, the Secretary, pursuant to Section 8c of the Act, issued a proclamation in which he found that satisfactory statistics were not available for the base period August 1909 to July 1914, but that such statistics were available for the period August 1919 to July 1929. He therefore proclaimed the latter period to be the applicable base period to be used in determining parity prices.[34]

The order was issued on August 28, 1939, to be effective September 1, 1939.[35]

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[32] Petitioner's more definite statement (R. 61–83) offered in evidence by respondent (R. 201) shows that 15,695 producers were requested to vote, 11,278 approved the issuance of the order, 699 disapproved, and the ballots of 269 were disqualified.

[33] 4 Fed. Reg. 3770.

[34] 4 Fed. Reg. 3770.

[35] 4 Fed. Reg. 3764.

A. THE ORDER IS BASED UPON A HEARING INITIATED AND CONDUCTED IN ACCORDANCE WITH LAW

Respondent contends that the entire order and all the findings are invalid because the Secretary did not hold a hearing upon the order as issued (cross-petition, pp. 8–10).

The hearing was held upon a proposed marketing agreement and order. The order finally approved after the hearing differed from the proposed agreement in certain respects (see p. 45, *infra*).

In support of its contention respondent apparently takes the position that Sections 8c (3), 8c (9), and 8c (10) of the Act are to be construed as permitting only the issuance of an order which is precisely identical to a marketing agreement proposed in advance of the prescribed hearing. The necessary implication of the argument is that after a hearing the Secretary is limited to approving or disapproving the proposal and cannot use the evidence received to make such revisions as he finds necessary before submitting a proposed marketing agreement or promulgating an order.

Respondent apparently relies on the provision in Section 8c (10) that—

> No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the same respective classes of industrial or commercial activity

specified in, a marketing agreement upon which a hearing has been held.

Obviously the foregoing provision does not require precise identity between the proposal and the order; it only requires that the order regulate in the same manner the same classes of people. A comparison of the proposal on which the hearing was held with the order as issued (R. 8–22) shows that the three documents vary only in matters of detail.[36] The general scheme or "the manner" of regulation is the same in each; each provides minimum classified prices which handlers are required to pay for milk purchased from producers, and each provides for distributing the returns from the classified prices to all producers through a market-wide equalization pool. Furthermore, the proposal, the marketing agreement, and the order are all applicable to persons engaged in precisely the same class of industrial or commercial activity, *i. e.*, the handling of milk.

The principal difference between the proposed marketing agreement and the order as issued to which respondent has called attention is that the marketing area in the original proposal was larger than the marketing area designated in the final order. However, that means no more than that the order regulates fewer persons engaged in the

[36] The proposal appears in Def. Ex. 1 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 1. A comparison of that proposal with the order as issued is set forth in detail in Appendix B, *infra*.

particular class of industrial or commercial activity than was originally proposed. The statute, in requiring that the order be applicable *only* to persons engaged in the same classes of activity as specified in the proposal, fixes the maximum applicability of the order but does not prescribe the minimum number of persons who shall be regulated.

The obvious reason for referring to "a marketing agreement upon which a hearing has been held," was to insure that there had been a public hearing upon the general scheme of regulation finally put into effect, and that no class of persons should be subjected to regulation except those put on notice by the proposal. Certainly, it was not intended that the Secretary should be prohibited from making such changes within the general framework of the original scheme as should appear necessary from the evidence taken at the hearing. So to construe the statute would be to reach an absurd result. The Secretary would never be able to issue an order until he had held a hearing on a proposal which conformed in the most minute detail to the final order. This might involve the holding of innumerable hearings with the inevitable result that the last hearing would be purely *pro forma*. It is inconceivable that Congress "intended to force the Secretary to go through a meaningless ritual." *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 596.

B. THE SECRETARY PROPERLY DETERMINED THE APPLICABLE BASE PERIOD

Section 2 of the Act establishes the pre-war period August 1909 to July 1914 as the base period for which the purchasing power of milk must be determined in fixing parity prices in orders regulating the handling of that commodity. It is provided in Section 8e that if, in connection with the making of any marketing agreement or the issuance of any order, the Secretary finds and proclaims that the purchasing power during the base period specified in Section 2 cannot satisfactorily be determined from available statistics in the Department of Agriculture, then the base period shall be August 1919 to July 1929, or any part thereof, for which the Secretary finds that satisfactory statistics are available. In connection with the present order, the Secretary adopted August 1919 to July 1929 as the base period.

1. Respondent asserts that the Secretary's determination is invalid because he failed to find in the order that the purchasing power of milk could not be satisfactorily determined for the period August 1909 to July 1914 from available statistics in the Department of Agriculture. Respondent makes no mention of the fact that on the same day, August 28, 1939, the Secretary issued a proclamation, published in the Federal Register, in which he set forth all of the findings required by Section 8e of the Act and adopted August 1919

to July 1929 as the base period to be used in connection with this order."[37] If respondent was aware of the existence of this finding, we must assume that its objection is based upon the fact that the Secretary made the finding in a separate document instead of including it in his order. But nothing in Section 8e indicates that the finding must be included in the order, and, in fact, the section gives every indication that a separate proclamation was intended.[38] Neither does Sec-

[37] The proclamation reads as follows (4 Fed. Reg., 3770):

"Pursuant to the powers conferred upon the Secretary of Agriculture by the terms and provisions of Public Act No. 10, 73d Congress, as amended and as reenacted and amended by the Agricultural Marketing Agreement Act of 1937, the Secretary of Agriculture hereby finds and proclaims that, in connection with the execution of a marketing agreement and the issuance of an order regulating the handling of milk in the Chicago, Illinois, marketing area, the purchasing power of such milk during the base period August 1909–July 1914 cannot be satisfactorily determined from available statistics of the Department of Agriculture, but that the purchasing power of such milk can be satisfactorily determined from available statistics in the Department of Agriculture for the period August 1919–July 1929; and the period August 1919–July 1929 is hereby found and proclaimed to be the base period to be used in connection with ascertaining the purchasing power of milk handled in the Chicago, Illinois, marketing area, for the purpose of the execution of a marketing agreement and the issuance of an order regulating the handling of milk in that area."

[38] Section 8e reads as follows:

"SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in sec-

tion 8c (4) require this finding to be set forth in the order; that section refers only to the findings required by Section 8c of the Act, and not to Section 8e.

It has been the consistent administrative practice to issue separate proclamations as to the base period in connection with marketing agreements and orders, and no court has disapproved the practice. Cf. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533; *H. P. Hood & Sons* v. *United States*, 307 U. S. 588. The opinion in the *Hood* case reveals that a similar proclamation with respect to the base period was issued separate from and at least 11 days before the issuance of the order. 307 U. S., at 592. Furthermore, the decision in the *Hood* case definitely rejects an argument substantially indistinguishable from respondent's here. There the Secretary, in *amending* an order, used the post-war base period authorized under Section 8e. No new proclamation was issued pursuant to Section 8e, although Section 8c (17) specifically provides that all of the provisions of Sections 8c, 8d, and 8e applicable to orders shall be applicable to amendments. This

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tion 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture."

Court held that the Secretary's proclamation issued in connection with the promulgation of the original order satisfied the requirements of Section 8e in connection with the issuance of the amendment. 307 U. S., at pp. 595–596.

2. Respondent also insists that there was no evidence before the Secretary to support the finding that statistics were not available for the pre-war base period. We submit that the determination which the Secretary is required to make under Section 8e of the Act is not one which should be subjected to judicial review. The Secretary's finding serves the sole purpose of selecting one of two available standards to guide administrative judgment. The proclamation informs all concerned, including whatever courts may subsequently be required to review the order, as to which standard the Secretary has adopted. The fact which is determined is as to the availability of satisfactory statistics in the Department of Agriculture. In making that determination, the Secretary necessarily exercises administrative discretion. He must determine, *first*, what statistics are available in his Department and, *second*, which of the available statistics are satisfactory. The authority thus vested in the Secretary is not unlike authority given to the Director of the Mint to estimate, and to the Secretary of the Treasury to proclaim, the value of foreign coins; or authority given to the Secretary of the Interior to make determinations as to public lands; or authority

given to the Secretary of the Interior to determine the tribal membership status of Indians; or authority given to the Comptroller of the Currency to determine the necessity for stock assessments in the case of insolvent banks. In all of these instances, the courts have held that such determinations are exercises of administrative discretion which are final and cannot be reviewed by the courts. *Hadden* v. *Merritt,* 115 U. S. 25; *Riverside Oil Co.* v. *Hitchcock,* 190 U. S. 316; *West* v. *Hitchcock,* 205 U. S. 80; *Adams* v. *Nagle,* 303 U. S. 532. It follows that the Secretary's determinations under Section 8e are exercises of administrative discretion not reviewable by the courts.

Nevertheless, if it should be held that the Secretary's determination is reviewable, it is apparent from the evidence that his findings are amply supported. Respondent has pointed to certain statistics in the record of the administrative hearing which relate to milk prices in Chicago during the pre-war period. No reference is made to the fact that these prices are not on a classified-use basis and hence are not comparable to the prices which the Secretary put into effect pursuant to Section 8c (5) A of the Act. In fact the record affirmatively shows that the classified-use plan of pricing milk did not come into operation in the Chicago market until after 1918.[39] It

[39] See Def. Ex. 4 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 2, p. 18, and Def. Ex. 3 (Original), p. 165.

is apparent that statistics relating to milk prices prior to the introduction of the classified-use plan in 1918 are not satisfactory statistics for computing the purchasing power of milk which is to be sold on a classified-use basis.

C. THE SECRETARY PROPERLY DETERMINED THAT THE ORDER HAD RECEIVED THE REQUISITE PRODUCER APPROVAL

Respondent contends that the Secretary failed to comply with Section 8c (9) of the Act,[40] first, because he failed to find that the order was approved by at least two-thirds of the producers who, during a representative period, were engaged in the production of milk for sale in the marketing area and, second, because the Secretary, in endeavoring to determine the question of approval, failed to comply with Section 8c (19) which provides for the conduct of a referendum among producers. The attack upon the sufficiency of the Secretary's finding is based upon the phraseology

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[40] Section 8c (9) provides that orders "shall become effective in the event that * * * the Secretary of Agriculture, with the approval of the President, determines" (1) that the refusal or failure of handlers to sign a marketing agreement tends to prevent the effectuation of the declared policy of the Act; (2) that the issuance of the order is the only practical means of advancing the interests of producers pursuant to the declared policy of the Act; and (3) that the issuance of the order is approved or favored either (a) by two-thirds of the producers who, during a representative period, were engaged in the production of the commodity for sale in the marketing area, or (b) by producers who, during a representative period, produce two-thirds of the volume of such commodity in the marketing area.

of the finding. The attack upon the referendum is based upon the Secretary's determination as to who should be allowed to participate in it.

The Secretary found and set forth in the order that over 67% of the producers voting in a referendum had approved or favored the order (R. 9).[41] Respondent insists that the finding does not satisfy the requirements of Section 8c(9)(B)(i) because the Secretary did not state that the order was favored by at least two-thirds of the producers who, during a representative period, had been engaged in the production for market of the commodity involved. While it is true that the Secretary's finding is not in the exact language of the statute, nevertheless the finding states the sole fact necessary to prove the requisite producer approval. The requirement in Section 8c(9) that two-thirds of the producers be found to favor the order is satisfied by a finding that two-thirds of those voting in a referendum have approved it. Cf. *Virginian Ry. Co.* v. *System Federation,* 300 U. S. 515, 559–561, dealing with an almost identical problem under the Railway Labor Act. See also *New York Handkerchief Mfg. Co.* v. *National Labor Relations Board,* 114 F. (2d) 144 (C. C. A. 7th), certiorari denied, 311 U. S. 704. If this were not otherwise clear, Section 8c (19) demonstrates that that was what Congress intended. The latter section provides that—

[41] A similar finding is contained in a separate determination made by the Secretary with the approval of the President. 4 Fed. Reg. 3770.

> For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provisions. * * *

We submit that in the light of this provision a finding that two-thirds of the voters in a referendum have approved the order satisfies the statute.[42] It is not essential that the Secretary's findings be in the exact words of the law as long as they adequately disclose the existence of the statutory requisites.

The Secretary's finding cannot be challenged on the basis of the results of the referendum. The total number of producers who, during April 1939, were engaged in the production of milk for sale in the Chicago market and who were notified to vote in the referendum, was 15,695. Of those pro-

[42] Section 8c (19) refers to the total number of producers *represented* in the referendum. The obvious reason for using the word "represented" instead of "participating" is that a cooperative association may, pursuant to the provisions of Section 8c (12) of the Act, cast the votes of all of its members.

ducers 11,278—well over two-thirds—voted in favor of the order and only 699 voted against it."[13]

Respondent contends, however, that the Secretary did not invite all qualified producers to participate in the referendum. This argument is based on the fact that the Secretary did not regard as qualified those who produced milk solely for manufacture into cheese, butter, evaporated milk, and similar products which were subsequently sold to consumers in the Chicago marketing area.

It is true that the Secretary limited participation in the referendum to producers who were delivering fluid milk to handlers engaged in the distribution and sale of fluid milk in the marketing area; but those are the only producers whose milk is subject to the order. The order provides a method of payment to "producers," and a producer is defined as "any person who produces milk which is received by a handler at a plant which is approved by any health authority for the receiving of milk for sale in the marketing area, or who produces milk which, upon proof furnished satisfactory to the market administrator, is qualified to be received at such plant" (R. 11). The order also defines handlers who are subject to regulation thereunder as any person who purchases or receives milk from producers or other handlers

[13] These facts are set forth in plaintiff's more definite statement (R. 61) which was not controverted by the defendant but was in fact offered in evidence by the defendant in the final hearing (R. 201).

and disposes of a part thereof as milk or cream in the marketing area (R. 11). Thus, it is apparent that this is an order fixing prices for milk which is qualified and available for sale in the marketing area as fluid milk. Only those producers who are engaged in the production of such milk are affected by the order. Consequently, they were the only ones entitled to participate in the referendum.

Practically the same argument as that advanced by respondent was urged in *H. P. Hood & Sons* v. *United States*, 307 U. S. 588, 597–599. There the contention was made that a large number of southern and western producers who delivered milk to stations shipping cream to the Boston market should have been permitted to vote. This Court pointed out that such producers were not engaged in the production of milk for shipment into the marketing area in fluid form, and held that the Secretary had properly excluded them from the referendum. *A fortiori* the exclusion in this case of producers engaged in producing milk only for manufacture into cheese, butter, etc., was entirely proper.

D. THE SECRETARY DEFINED THE MARKETING AREA IN THE ORDER IN ACCORDANCE WITH THE TERMS OF THE STATUTE

The marketing area to which this order is applicable is defined as consisting of the cities, towns, and villages of Chicago, Evanston, Wilmette, Kenilworth, Winnetka, and Glencoe (R. 11). Respondent asserts that the Secretary arbitrarily

omitted from the marketing area neighboring cities and towns in the same vicinity, such as Oak Park, Berwyn, Cicero, and others. Although it is charged that the Secretary's definition was unlawful, discriminatory, unreasonable, void, and contrary to the Act, the sole basis for this argument appears to be that handlers are required to pay producers more for milk sold within the marketing area than other handlers are required to pay for milk which they sell outside of the marketing area.

The fallacy of respondent's argument is apparent from the face of the order. The order provides that every handler who sells milk within the marketing area must account for that milk at the prices fixed in the order (R. 14–15). However, handlers subject to the order who sell part of their milk outside the marketing area are only required to pay for that milk at the price which the Market Administrator determines to be the prevailing price in the market in which the milk is sold (R. 16). Obviously there is no discrimination as between handlers who are subject to the order and handlers who are not subject to the order insofar as sales outside the marketing area are concerned.

In *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533, an argument very similar to that advanced by respondent was rejected. There it was contended that the failure to include portions of New Jersey in the New York marketing

area placed handlers selling only in the New York area at a disadvantage. The argument was that handlers selling both within the New York area and outside the New York area could use the profits obtained from the sale of milk in unregulated areas to cut prices within the regulated marketing area. This Court held that such a showing would not amount to illegal discrimination. There is even less basis for claiming discrimination in the instant case.

Insofar as respondent claims that the marketing area was not prescribed in accordance with the terms of the Act, we fail to find any justification for that argument in the statute. The only limitations prescribed in regard to fixing the size of marketing areas are contained in Section 8c (11) of the Act. Nothing contained in that section supports respondent's argument.

If respondent intends to urge that the Secretary's action in some way violates constitutional rights it is equally apparent that the argument is without merit. In all cases in which a statute leaves to an administrative body the duty of determining the exact limits of regulation there is a wide zone of discretion. A boundary must always be drawn at some point, and the differentiation between similar situations close to but on opposite sides of the borderline will inevitably seem arbitrary. But in the absence of a plain abuse of discretion, courts will not interfere. See *Carmichael* v. *Southern Coal Co.*, 301 U. S. 495.

The record before the Secretary indicates the reasonableness of the particular geographical limits adopted. It shows that the towns included in the order were the only ones having health standards comparable to those in force in Chicago.[44] It is obviously practicable and reasonable that those communities should be included in the marketing area which have comparable requirements as to the quality and conditions of production of milk sold for consumption in fluid form.

II

THE ACT CONTAINS NO INVALID DELEGATION OF LEGISLATIVE POWER

Respondent contends that the Act contains invalid delegations of legislative authority in the provisions authorizing the Secretary to make adjustments in prices previously established (Section 8c (18)) and to issue regulations (Section 10 (c)).

Respondent does not point to any particular action taken under either of these sections, and it does not appear that any orders or regulations issued under them have been in any way prejudi-

[44] The testimony establishes the necessity for including in the marketing area only towns having similar health standards for milk (Def. Ex. 3 (Original), pp. 462–463, 512–514). It also appears that Evanston, Kenilworth, Wilmette, Winnetka, and Glencoe, Illinois, were the only neighboring towns having health standards comparable to Chicago at that time (see supplemental brief of Pure Milk Association, pp. 1–2a, contained in Def. Ex. 2 (Original); Def. Ex. 3 (Original), pp. 103–105).

cial to respondent. Accordingly, respondent has no standing to question their constitutionality. *Heald* v. *District of Columbia,* 259 U. S. 114, 123, and cases cited; *Virginian Railway Co.* v. *System Federation,* 300 U. S. 515, 558; *Premier-Pabst Co.* v. *Grosscup,* 298 U. S. 226, 227; *Henneford* v. *Silas Mason Co.,* 300 U. S. 577, 583.

In any event, the contentions are frivolous. It is clear from Section 8c (18) as a whole [45] that the

[45] Section 8c (18) reads as follows:

"The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a suf-

Secretary is to follow the same standards in adjusting prices when "necessary on account of changed circumstances" as in fixing prices originally. These standards are set forth at length in the three preceding sentences, the validity of which was upheld in *United States* v. *Rock Royal Cooperative, Inc.*, 307 U. S. 533, 576–577. The authority "to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title" (Section 10 (c)) is also clearly valid. *United States* v. *Grimaud*, 220 U. S. 506. In the *Grimaud* case, as here, penalties were imposed for violation of the administrative regulation.

III

THE ACT IS NOT VOID BECAUSE IN CONFLICT WITH FEDERAL AND STATE ANTITRUST LAWS

Respondent also asserts that the Act is invalid because it conflicts with the federal and Illinois antitrust laws. There is plainly no conflict between these statutes and the Agricultural Marketing Agreement Act. And if there were, the later federal law would prevail over the earlier, and also over any conflicting state enactment.

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ficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices."

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IV

THE CASE IS NOT MOOT

Respondent contends that the case is moot because the original Order No. 41 (R. 8), effective September 1, 1939, was "repealed" by "Order No. 41, as amended" (R. 120), effective July 1, 1940, after the complaint in this case was filed.[48]

The amended order differs from the original in many details, but not at all in its basic scheme. The original order was thus not repealed, in any realistic sense, but incorporated in the order as amended for the purpose of "preserving a harmonious text" *Posadas* v. *National City Bank*, 296 U. S. 497, 503–506, and cases cited; *Bear Lake Irrigation Co.* v. *Garland*, 164 U. S. 1, 11.

Even if the original order is regarded as having expired the case is not moot. It is undisputed that respondent has failed to make the payments to the market administrator required under the original order (R. 158, 246) and demanded in the complaint (R. 5–7). The obligation to make such payments would have survived the termination of the order. For the order (R. 21) provided in Section 941.12 (c) that—

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[48] The complaint was filed December 26, 1939 (R. 2).

> * * * If upon the suspension or termination of any or all provisions hereof, there are any obligations arising hereunder, the final accrual or ascertainment of which requires further acts by any handler, by the market administrator, or by any other person, the power and duty to perform such further acts shall continue notwithstanding such suspension or termination * * *.

Respondent apparently contends that, since the amended order took the place of the original, the above provision was abrogated and accordingly ineffective to preserve accrued rights. This does not follow, inasmuch as it cannot be assumed that any termination of the order was intended to nullify this particular provision. But in any event, the amended order contains an identical clause (R. 140), and thus plainly manifests an intention that, to that extent at least, the original order be continued and not repealed. *Posadas* v. *National City Bank, Bear Lake Irrigation Co.* v. *Garland,* both *supra.* It is absurd to suggest that the replacement of one order preserving existing obligations by a similar order containing the same provisions has the effect of cancelling the obligations which have accrued under the original order.

In the *Rock Royal* case the Court held that, in view of a similar provision preserving accrued rights, the complete suspension of the New York

milk order did not render the case moot (307 U. S., at 555–556). Here there has not even been a suspension, but only a continuation of the obligation in altered form.

Closely in point also are *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 413–414, *Southern Pacific Terminal Company* v. *Interstate Commerce Commission*, 219 U. S. 498, 514–516, and *Federal Trade Commission* v. *Goodyear Tire & Rubber Co.*, 304 U. S. 257. In the *Panama* case the amendment of regulations issued by the Secretary of the Interior was held not to render the case moot. In the *Southern Pacific* case the Court refused to hold moot a case involving an order of the Interstate Commerce Commission which had previously expired, inasmuch as (219 U. S., at 515)—

> * * * The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, * * *.

In the *Goodyear* case the Court held that an amendment to the statute did not render moot a controversy arising out of Goodyear's failure to comply with the law before the amendment.

CONCLUSION

It is submitted that the decision of the court below should be reversed and that Order No. 41 should be sustained on the merits.

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JANUARY 1942.

UNITED STATES DEPARTMENT OF AGRICULTURE
DIVISION OF MARKETING AND MARKETING AGREEMENTS

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937

REENACTING, AMENDING, AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED

(Including Amendments of the 76th Congress, 1st Session)

UNITED STATES
GOVERNMENT PRINTING OFFICE
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PREFATORY NOTE

This compilation is intended to indicate the present status of legislation by Congress relating to marketing agreements and orders regulating the handling of agricultural commodities in interstate and foreign commerce. The Agricultural Marketing Agreement Act of 1937, approved June 3, 1937 (Public, No. 137—75th Congress—Chap. 296, 1st Session, 7 U. S. C. A. 674, 50 Stat. 249), reenacted and amended certain provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders. Related legislation enacted prior to June 3, 1937, is given in the compilation known as "Annotated Compilation of the Agricultural Adjustment Act, as Amended, and Acts Relating Thereto at the Close of the First Session of the Seventy-Fourth Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

Throughout the text of this compilation, bold face type is used for the language of the Agricultural Marketing Agreement Act of 1937; light face type is used for the language of the Agricultural Adjustment Act, as amended, as reenacted by the Agricultural Marketing Agreement Act of 1937; italics are used for amendments made by section 2 of the Agricultural Marketing Agreement Act of 1937 to the Agricultural Adjustment Act, as amended.

The provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are not set out haec verba. They are, however, incorporated in the body of the provisions of the Agricultural Adjustment Act, as amended, which they amend. References to the amendatory provisions of section 2 of the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes. References to recent amendments to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 are contained in the footnotes.

COMPILATION OF AGRICULTURAL MARKETING AGREEMENT ACT OF 1937 REENACTING, AMENDING AND SUPPLEMENTING THE AGRICULTURAL ADJUSTMENT ACT, AS AMENDED[1]

AN ACT

To reenact and amend provisions of the Agricultural Adjustment Act, as amended, relating to marketing agreements and orders.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, that the following provisions of the Agricultural Adjustment Act, as amended, not having been intended for the control of the production of agricultural commodities, and having been intended to be effective irrespective of the validity of any other provision of that act are expressly affirmed and validated, and are reenacted without change except as provided in section 2:

(a) Section 1 (relating to the declaration of emergency);

DECLARATION

It is hereby declared that the disruption of the orderly exchange of commodities in interstate commerce impairs the purchasing power of farmers and destroys the value of agricultural assets which support the national credit structure and that these conditions affect transactions in agricultural commodities with a national public interest, and burden and obstruct the normal channels of interstate commerce.[2]

(b) Section 2 (relating to declaration of policy):

DECLARATION OF POLICY

SEC. 2. It is hereby declared to be the policy of Congress—

(1) Through the exercise of the powers conferred upon the Secretary of Agriculture under this title, to establish and maintain such

[1] For annotations to the Agricultural Adjustment Act, as amended; for provisions of that act not reenacted by the provisions of the Agricultural Marketing Agreement Act of 1937; and for other acts of Congress relating both to the Agricultural Adjustment Act, as amended, and to the Agricultural Marketing Agreement Act of 1937 see "Annotated Compilation of Agricultural Adjustment Act as Amended and Acts Relating Thereto at the Close of the First Session of the 74th Congress, August 26, 1935"; Superintendent of Documents, Washington, D. C.

[2] As amended by sec. 2 (a) of the Agricultural Marketing Agreement Act of 1937. The text of sec. 1 of the Agricultural Adjustment Act, as amended, was as follows:

"DECLARATION OF EMERGENCY

"That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities, and render imperative the immediate enactment of title I of this Act."

orderly marketing conditions for agricultural commodities in interstate commerce as will establish[3] prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period; and, in the case of all commodities for which the base period is the pre-war period, August 1909 to July 1914, will also reflect current interest payments per acre on farm indebtedness secured by real estate and tax payments per acre on farm real estate, as contrasted with such interest payments and tax payments during the base period. The base period in the case of all agricultural commodities except tobacco and potatoes shall be the pre-war period, August 1909–July 1914. In the case of tobacco and potatoes, the base period shall be the postwar period, August 1919–July 1929.

(2) To protect the interest of the consumer by (a) approaching the level of prices which it is declared to be the policy of Congress to establish in subsection (1) of this section by gradual correction of the current level at as rapid a rate as the Secretary of Agriculture deems to be in the public interest and feasible in view of the current consumptive demand in domestic and foreign markets, and (b) authorizing no action under this title which has for its purpose the maintenance of prices to farmers above the level which it is declared to be the policy of Congress to establish in subsection (1) of this section.

(c) Section 8a (5), (6), (7), (8), and (9) relating to violations and enforcement;

SEC. 8a(5) Any person willfully exceeding any quota or allotment fixed for him under this title by the Secretary of Agriculture, and any other person knowingly participating, or aiding, in the exceeding of said quota or allotment, shall forfeit to the United States a sum equal to three times the current market value of such excess, which forfeiture shall be recoverable in a civil suit brought in the name of the United States.

(6) The several district courts of the United States are hereby vested with jurisdiction specifically to enforce, and to prevent and restrain any person from violating[4] any order, regulation, or agreement, heretofore or hereafter made or issued pursuant to this title, in any proceeding now pending or hereafter brought in said courts.

(7) Upon the request of the Secretary of Agriculture, it shall be the duty of the several district attorneys of the United States, in their respective districts, under the directions of the Attorney General, to institute proceedings to enforce the remedies and to collect the forfeitures provided for in, or pursuant to, this title. Whenever the Secretary, or such officer or employee of the Department of Agriculture as he may designate for the purpose, has reason to believe that any handler has violated, or is violating, the provisions of any order or amendment thereto issued pursuant to this title, the Secretary shall have power to institute an investigation and, after due notice to such handler, to conduct a hearing in order to deter-

[3] The italicized words were substituted, by sec. 2 (b) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish".

[4] The following was deleted by section 2 (c) of the Agricultural Marketing Agreement Act of 1937: ", the provisions of this section, or of".

mine the facts for the purpose of referring the matter to the Attorney General for appropriate action.

(8) The remedies provided for in this section shall be in addition to, and not exclusive of, any of the remedies or penalties provided for elsewhere in this title or now or hereafter existing at law or in equity.

(9) The term "person" as used in this title includes an individual, partnership, corporation, association, and any other business unit.

(d) Section 8b (relating to marketing agreements);

SEC. 8b. In order to effectuate the declared policy of this title, the Secretary of Agriculture shall have the power, after due notice and opportunity for hearing, to enter into marketing agreements with processors, producers, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof, only with respect to such handling as is in the current of interstate or foreign commerce or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof. The making of any such agreement shall not be held to be in violation of any of the antitrust laws of the United States, and any such agreement shall be deemed to be lawful: Provided, That no such agreement shall remain in force after the terminations of this Act. For the purpose of carrying out any such agreement the parties thereto shall be eligible for loans from the Reconstruction Finance Corporation under section 5 of the Reconstruction Finance Corporation Act. Such loans shall not be in excess of such amounts as may be authorized by the agreements.

(e) Section 8c (relating to orders);

ORDERS

SEC. 8c. (1) The Secretary of Agriculture shall, subject to the provisions of this section, issue, and from time to time amend, orders applicable to processors, associations of producers, and others engaged in the handling of any agricultural commodity or product thereof specified in subsection (2) of this section. Such persons are referred to in this title as "handlers." Such orders shall regulate, in the manner hereinafter in this section provided, only such handling of such agricultural commodity, or product thereof, as is in the current of interstate or foreign commerce, or which directly burdens, obstructs, or affects, interstate or foreign commerce in such commodity or product thereof.

COMMODITIES TO WHICH APPLICABLE

(2) Orders issued pursuant to this section shall be applicable only to the following agricultural commodities and the products thereof (except products of naval stores *and the products of honeybees*),[5] or to any regional, or market classification of any such commodity or product: Milk, fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Ore-*

[5] The words "and the products of honeybees" were inserted by public, No. 246, 75th Congress, Chapter 587, 1st session, approved August 5, 1937.

gon, and Idaho,[6] and not including fruits, other than olives, for canning), tobacco, vegetables (not including vegetables, other than asparagus, for canning), soybeans, hops,[7] honeybees,[8] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin).

NOTICE AND HEARING

(3) Whenever the Secretary of Agriculture has reason to believe that the issuance of an order will tend to effectuate the declared policy of this title with respect to any commodity or product thereof specified in subsection (2) of this section, he shall give due notice of and an opportunity for a hearing upon a proposed order.

FINDING AND ISSUANCE OF ORDER

(4) After such notice and opportunity for hearing, the Secretary of Agriculture shall issue an order if he finds, and sets forth in such order, upon the evidence introduced at such hearing (in addition to such other findings as may be specifically required by this section) that the issuance of such order and all of the terms and conditions thereof will tend to effectuate the declared policy of this title with respect to such commodity.

TERMS—MILK AND ITS PRODUCTS

(5) In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers.

(B) Providing:

(i) for the payment to all producers and associations of producers delivering milk to the same handler of uniform prices for all milk delivered by them: Provided, That, except in the

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[6] The words ", other than apples produced in the States of Washington, Oregon, and Idaho," were added by Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.

[7] The word ", hops," was inserted by and the following provision was contained in Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938:

"SEC. 3. No order issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops except during the two crop years next succeeding the date of enactment of this Act."

The provision quoted was amended by Public, No. 91, 76th Congress, Chapter 150, 1st session, approved May 26, 1939, to read as follows:

"SEC. 3. No orders issued pursuant to section 8c of the Agricultural Adjustment Act, as amended, shall be applicable to hops after September 1, 1942."

[8] The word "honeybees," was inserted by Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.

case of orders covering milk products only, such provision is approved or favored by at least three-fourth of the producers who, during a representative period determined by the Secretry of Agriculture, have been engaged in the production for market of milk covered in such order or by producers who, during such representative period, have produced at least three-fourths of the volume of such milk produced for market during such period; the approval required hereunder shall be separate and apart from any other approval or disapproval provided for by this section; or

(ii) for the payment to all producers and associations of producers delivering milk to all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their *marketings*[1] *of* milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection (5), providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) hereof.

(D) Providing that, in the case of all milk purchased by handlers from any producer who did not regularly sell milk during a period of 30 days next preceding the effective date of such order for consumption in the area covered thereby, payments to such producer, for the period beginning with the first regular delivery by such producer and continuing until the end of two full calendar months following the first day of the next succeeding calendar month, shall be made at the price for the lowest use classification specified in such order, subject to the adjustments specified in paragraph (B) of this subsection (5).

(E) Providing (i) except as to producers for whom such services are being rendered by a cooperative marketing association, qualified as provided in paragraph (F) of this subsection (5), for market information to producers and for the verification of weights, sampling, and testing of milk purchased from producers, and for making appropriate deductions therefor from payments to producers, and (ii) for assurance of, and security for, the payment by handlers for milk purchased.

(F) Nothing contained in this subsection (5) is intended or shall be construed to prevent a cooperative marketing association qualified under the provisions of the Act of Congress of February 18, 1922, as amended, known as the "Capper-Volstead Act," engaged in making

[1] The word "production" was deleted and the word "marketings" was substituted by section 2 (d) of the Agricultural Marketing Agreement Act of 1937.

collective sales or marketing of milk or its products for the producers thereof, from blending the net proceeds of all its sales in all markets in all use classifications, and making distribution thereof to its producers in accordance with the contract between the association and its producers: Provided, That it shall not sell milk or its products to any handler for use or consumption in any market at prices less than the prices fixed pursuant to paragraph (A) of this subsection (5) for such milk.

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

TERMS—OTHER COMMODITIES

(6) In the case of fruits (including pecans and walnuts but not including apples, *other than apples produced in the States of Washington, Oregon, and Idaho*,[10] and not including fruits, other than olives, for canning) and their products, tobacco and its products, vegetables (not including vegetables, other than asparagus, for canning) and their products, soybeans and their products, *hops*,[11] *honeybees*,[12] and naval stores as included in the Naval Stores Act and standards established thereunder (including refined or partially refined oleoresin), orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7)) no others:

(A) Limiting, or providing methods for the limitation of, the total quantity of any such commodity or product, or of any grade, size, or quality thereof, produced during any specified period or periods, which may be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods by all handlers thereof.

(B) Allotting, or providing methods for allotting, the amount of such commodity or product, or any grade, size, or quality thereof, which each handler may purchase from or handle on behalf of any and all producers thereof, during any specified period or periods, under a uniform rule based upon the amounts [13] sold by such producers in such prior period as the Secretary determines to be representative, or upon the current *quantities available for sale by* [14] such producers, or both, to the end that the total quantity thereof to be purchased, or handled during any specified period or periods shall be apportioned equitably among producers.

(C) Allotting, or providing methods for allotting, the amount of any such commodity or product, or any grade, size, or quality thereof, which each handler may market in or transport to any or all markets

[10] Public, No. 98, 76th Congress, Chapter 157, 1st session, approved May 31, 1939.
[11] Public, No. 482, 75th Congress, Chapter 143, 3d session, approved April 13, 1938.
[12] Public, No. 246, 75th Congress, Chapter 567, 1st session, approved August 5, 1937.
[13] The words "produced or" were deleted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937.
[14] The italicized words were substituted by section 2 (e) of the Agricultural Marketing Agreement Act of 1937, in lieu of the words: "production or sales of".

in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, under a uniform rule based upon the amounts which each such handler has available for current shipment, or upon the amounts shipped by each such handler in such prior period as the Secretary determines to be representative, or both, to the end that the total quantity of such commodity or product, or any grade, size, or quality thereof, to be marketed in or transported to any or all markets in the current of interstate or foreign commerce or so as directly to burden, obstruct, or affect interstate or foreign commerce in such commodity or product thereof, during any specified period or periods shall be equitably apportioned among all of the handlers thereof.

(D) Determining, or providing methods for determining, the existence and extent of the surplus of any such commodity or product, or of any grade, size, or quality thereof, and providing for the control and disposition of such surplus, and for equalizing the burden of such surplus elimination or control among the producers and handlers thereof.

(E) Establishing, or providing for the establishment of, reserve pools of any such commodity or product, or of any grade, size, or quality thereof, and providing for the equitable distribution of the net return derived from the sale thereof among the persons beneficially interested therein.

TERMS COMMON TO ALL ORDERS

(7) In the case of the agricultural commodities and the products thereof specified in subsection (2) orders shall contain one or more of the following terms and conditions:

(A) Prohibiting unfair methods of competition and unfair trade practices in the handling thereof.

(B) Providing that (except for milk and cream to be sold for consumption in fluid form) such commodity or product thereof, or any grade, size, or quality thereof shall be sold by the handlers thereof only at prices filed by such handlers in the manner provided in such order.

(C) Providing for the selection by the Secretary of Agriculture, or a method for the selection, of an agency or agencies and defining their power and duties, which shall include only the powers:

(i) To administer such order in accordance with its terms and provisions;

(ii) To make rules and regulations to effectuate the terms and provisions of such order;

(iii) To receive, investigate, and report to the Secretary of Agriculture complaints of violations of such order; and

(iv) To recommend to the Secretary of Agirculture amendments to such order.

No person acting as a member of an agency established pursuant to this paragraph (C) shall be deemed to be acting in an official capacity, within the meaning of section 10 (g) of this title, unless such person receives compensation for his personal services from funds of the United States.

(D) Incidental to, and not inconsistent with, the terms and conditions specified in subsections (5), (6), and (7) and necessary to effectuate the other provisions of such order.

ORDERS WITH MARKETING AGREEMENT

(8) Except as provided in subsection (9) of this section, no order issued pursuant to this section shall become effective until the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of not less than 50 per centum of the volume of the commodity or product thereof covered by such order which is produced or marketed within the production or marketing area defined in such order have signed a marketing agreement, entered into pursuant to section 8b of this title, which regulates the handling of such commodity or product in the same manner as such order, except that as to citrus fruits produced in any area producing what is known as California citrus fruits no order issued pursuant to this subsection (8) shall become effective until the handlers of not less than 80 per centum of the volume of such commodity or product thereof covered by such order have signed such a marketing agreement: Provided, That no order issued pursuant to this subsection shall be effective unless the Secretary of Agriculture determines that the issuance of such order is approved or favored:

(A) By at least two-thirds of the producers who (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers), during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(B) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

ORDERS WITH OR WITHOUT MARKETING AGREEMENT

(9) Any order issued pursuant to this section shall become effective in the event that, notwithstanding the refusal or failure of handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) covered by such order which is produced or marketed within the production or marketing area defined in such order to sign a marketing agreement relating

to such commodity or product thereof, on which a hearing has been held, the Secretary of Agriculture, with the approval of the President, determines:

(A) That the refusal or failure to sign a marketing agreement (upon which a hearing has been held) by the handlers (excluding cooperative associations of producers who are not engaged in processing, distributing, or shipping the commodity or product thereof covered by such order) of more than 50 per centum of the volume of the commodity or product thereof (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said per centum shall be 80 per centum) specified therein which is produced or marketed within the production or marketing area specified therein tends to prevent the effectuation of the declared policy of this title with respect to such commodity or product, and

(B) That the issuance of such order is the only practical means of advancing the interests of the producers of such commodity pursuant to the declared policy, and is approved or favored:

(i) By at least two-thirds of the producers (except that as to citrus fruits produced in any area producing what is known as California citrus fruits said order must be approved or favored by three-fourths of the producers) who, during a representative period determined by the Secretary, have been engaged, within the production area specified in such marketing agreement or order, in the production for market of the commodity specified therein, or who, during such representative period, have been engaged in the production of such commodity for sale in the marketing area specified in such marketing agreement, or order, or

(ii) By producers who, during such representative period, have produced for market at least two-thirds of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or who, during such representative period, have produced at least two-thirds of the volume of such commodity sold within the marketing area specified in such marketing agreement or order.

MANNER OF REGULATION AND APPLICABILITY

(10) No order shall be issued under this section unless it regulates the handling of the commodity or product covered thereby in the same manner as, and is made applicable only to persons in the respective classes of industrial or commercial activity specified in, a marketing agreement upon which a hearing has been held. No order shall be issued under this title prohibiting, regulating, or restricting the advertising of any commodity or product covered thereby, nor shall any marketing agreement contain any provision prohibiting, regulating, or restricting the advertising of any commodity or product covered by such marketing agreement.

REGIONAL APPLICATION

(11) (A) No order shall be issued under this section which is applicable to all production areas or marketing areas, or both, of any commodity or product thereof unless the Secretary finds that the issuance of several orders applicable to the respective regional pro-

duction areas or regional marketing areas, or both, as the case may be, of the commodity or product would not effectively carry out the declared policy of this title.

(B) Except in the case of milk and its products, orders issued under this section shall be limited in their application to the smallest regional production areas or regional marketing areas, or both, as the case may be, which the Secretary finds practicable, consistently with carrying out such declared policy.

(C) All orders issued under this section which are applicable to the same commodity or product thereof shall, so far as practicable, prescribe such different terms, applicable to different production areas and marketing areas, as the Secretary finds necessary to give due recognition to the differences in production and marketing of such commodity or product in such areas.

COOPERATIVE ASSOCIATION REPRESENTATION

(12) Whenever, pursuant to the provisions of this section, the Secretary is required to determine the approval or disapproval of producers with respect to the issuance of any order, or any term or condition thereof, or the termination thereof, the Secretary shall consider the approval or disapproval by any cooperative association of producers, bona fide engaged in marketing the commodity or product thereof covered by such order, or in rendering services for or advancing the interests of the producers of such commodity, as the approval or disapproval of the producers who are members of, stockholders in, or under contract with, such cooperative association of producers.

RETAILER AND PRODUCER EXEMPTION

(13) (A) No order issued under subsection (9) of this section shall be applicable to any person who sells agricultural commodities or products thereof at retail in his capacity as such retailer, except to a retailer in his capacity as a retailer of milk and its products.

(B) No order issued under this title shall be applicable to any producer in his capacity as a producer.

VIOLATION OF ORDER

(14) Any handler subject to an order issued under this section, or any officer, director, agent, or employee of such handler, who violates any provision of such order (other than a provision calling for payment of a pro rata share of expenses) shall, on conviction, be fined not less than $50 or more than $500 for each such violation, and each day during which such violation continues shall be deemed a separate violation: Provided, That if the court finds that a petition pursuant to subsection (15) of this section was filed and prosecuted by the defendant in good faith and not for delay, no penalty shall be imposed under this subsection for such violations as occurred between the date upon which the defendant's petition was filed with the Secretary, and the date upon which notice of the Secretary's ruling thereon was given to the defendant in accordance with regulations prescribed pursuant to subsection (15).

PETITION BY HANDLER AND REVIEW

(15) (A) Any handler subject to an order may file a written petition with the Secretary of Agriculture, stating that any such order or any provision of any such order or any obligation imposed in connection therewith is not in accordance with law and praying for a modification thereof or to be exempted therefrom. He shall thereupon be given an opportunity for a hearing upon such petition, in accordance with regulations made by the Secretary of Agriculture, with the approval of the President. After such hearing, the Secretary shall make a ruling upon the prayer of such petition which shall be final, if in accordance with law.

(B) The District Courts of the United States (including the Supreme Court of the District of Columbia) in any district in which such handler is an inhabitant, or has his principal place of business, are hereby vested with jurisdiction in equity to review such ruling, provided a bill in equity for that purpose is filed within twenty days from the date of the entry of such ruling. Service of process in such proceedings may be had upon the Secretary by delivering to him a copy of the bill of complaint. If the court determines that such ruling is not in accordance with law, it shall remand such proceedings to the Secretary with directions either (1) to make such ruling as the court shall determine to be in accordance with law, or (2) to take such further proceedings as, in its opinion, the law requires. The pendency of proceedings instituted pursuant to this subsection (15) shall not impede, hinder, or delay the United States or the Secretary of Agriculture from obtaining relief pursuant to section 8a (6) of this title. Any proceedings brought pursuant to section 8a (6) of this title (except where brought by way of counterclaim in proceedings instituted pursuant to this subsection (15) shall abate whenever a final decree has been rendered in proceedings between the same parties, and covering the same subject matter, instituted pursuant to this subsection (15).

TERMINATION OF ORDERS AND MARKETING AGREEMENTS

(16) (A) The Secretary of Agriculture shall, whenever he finds that any order issued under this section, or any provision thereof, obstructs or does not tend to effectuate the declared policy of this title, terminate or suspend the operation of such order or such provision thereof.

(B) The Secretary shall terminate any marketing agreement entered into under section 8b, or order issued under this section, at the end of the then current marketing period for such commodity, specified in such marketing agreement or order, whenever he finds that such termination is favored by a majority of the producers who, during a representative period determined by the Secretary, have been engaged in the production for market of the commodity specified in such marketing agreement or order, within the production area specified in such marketing agreement or order, or who, during such representative period, have been engaged in the production of such commodity for sale within the marketing area specified in such marketing agreement or order: Provided, That such majority have,

during such representative period, produced for market more than 50 per centum of the volume of such commodity produced for market within the production area specified in such marketing agreement or order, or have, during such representative period, produced more than 50 per centum of the volume of such commodity sold in the marketing area specified in such marketing agreement or order, but such termination shall be effective only if announced on or before such date (prior to the end of the then current marketing period) as may be specified in such marketing agreement or order.

(C) The termination or suspension of any order or amendment thereto or provision thereof, shall not be considered an order within the meaning of this section.

PROVISIONS APPLICABLE TO AMENDMENTS

(17) The provisions of this section, section 8d, and section 8e applicable to orders shall be applicable to amendments to orders: Provided, That notice of a hearing upon a proposed amendment to any order issued pursuant to section 8c, given not less than three days prior to the date fixed for such hearing, shall be deemed due notice thereof.

Milk Prices

(18) The Secretary of Agriculture, prior to prescribing any term in any marketing agreement or order, or amendment thereto, relating to milk or its products, if such term is to fix minimum prices to be paid to producers or associations of producers, or prior to modifying the price fixed in any such term, shall ascertain, in accordance with section 2 and section 8e, the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period. The level of prices which it is declared to be the policy of Congress to establish in section 2 and section 8e shall, for the purposes of such agreement, order, or amendment, be such level as will reflect the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand, for milk or its products in the marketing area to which the contemplated marketing agreement, order, or amendment relates. Whenever the Secretary finds, upon the basis of the evidence adduced at the hearing required by section 8b or 8c, as the case may be, that the prices that will give such commodities a purchasing power equivalent to their purchasing power during the base period as determined pursuant to section 2 and section 8e are not reasonable in view of the price of feeds, the available supplies of feeds, and other economic conditions which affect market supply and demand for milk and its products in the marketing area to which the contemplated agreement, order, or amendment relates, he shall fix such prices as he finds will reflect such factors, insure a sufficient quantity of pure and wholesome milk, and be in the public interest. Thereafter, as the Secretary finds necessary on account of changed circumstances, he shall, after due notice and opportunity for hearing, make adjustments in such prices.[15]

[15] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement Act of 1937.

PRODUCER REFERENDUM

(19) For the purpose of ascertaining whether the issuance of an order is approved or favored by producers, as required under the applicable provisions of this title, the Secretary may conduct a referendum among producers. The requirements of approval or favor under any such provision shall be held to be complied with if, of the total number of producers, or the total volume of production, as the case may be, represented in such referendum, the percentage approving or favoring is equal to or in excess of the percentage required under such provision. Nothing in this subsection shall be construed as limiting representation by cooperative associations as provided in subsection (12).[16]

(f) Section 8d (relating to books and records);

BOOKS AND RECORDS

SEC. 8d. (1) All parties to any marketing agreement, and all handlers subject to an order, shall severally, from time to time, upon the request of the Secretary, to furnish him with such information as he finds to be necessary to enable him to ascertain and determine the extent to which such agreement or order has been carried out or has effectuated the declared policy of this title, and with such information as he finds to be necessary to determine whether or not there has been any abuse of the privilege of exemptions from the anti-trust laws. Such information shall be furnished in accordance with forms of reports to be prescribed by the Secretary. For the purpose of ascertaining the correctness of any report made to the Secretary pursuant to this subsection, or for the purpose of obtaining the information required in any such report, where it has been requested and has not been furnished, the Secretary is hereby authorized to examine such books, papers, records, copies of income-tax reports, accounts, correspondence, contracts, documents, or memoranda, as he deems relevant and which are within the control (1) of any such party to such marketing agreement, or any such handler, from whom such report was requested or (2) of any person having, either directly or indirectly, actual or legal control of or over such party or such handler or (3) of any subsidiary of any such party, handler, or person.

(2) Notwithstanding the provisions of section 7, all information furnished to or acquired by the Secretary of Agriculture pursuant to this section shall be kept confidential by all officers and employees of the Department of Agriculture and only such information so furnished or acquired as the Secretary deems relevant shall be disclosed by them, and then only in a suit or administrative hearing brought at the direction, or upon the request, of the Secretary of Agriculture, or to which he or any officer of the United States is a party, and involving the marketing agreement or order with reference to which the information so to be disclosed was furnished or acquired. Nothing in this section shall be deemed to prohibit (A) the issuance of general statements based upon the reports of a num-

[16] This italicized subsection was added by sec. 2 (f) of the Agricultural Marketing Agreement act of 1937.

ber of parties to a marketing agreement or of handlers subject to an order, which statements do not identify the information furnished by any person, or (B) the publication by direction of the Secretary, of the name of any person violating any marketing agreement or any order, together with a statement of the particular provisions of the marketing agreement or order violated by such person. Any such officer or employee violating the provisions of this section shall upon conviction be subject to a fine of not more than $1,000 or to imprisonment for not more than one year, or to both, and shall be removed from office.

(g) Section 8e (relating to determination of base period);

DETERMINATION OF BASE PERIOD

SEC. 8e. In connection with the making of any marketing agreement or the issuance of any order, if the Secretary finds and proclaims that, as to any commodity specified in such marketing agreement or order, the purchasing power during the base period specified for such commodity in section 2 of this title cannot be satisfactorily determined from available statistics of the Department of Agriculture, the base period, for the purposes of such marketing agreement or order, shall be the post-war period, August 1919–July 1929, or all that portion thereof for which the Secretary finds and proclaims that the purchasing power of such commodity can be satisfactorily determined from available statistics of the Department of Agriculture.

(h) Section 10 (a), (b) (2), (c), (f), (g), (h), and (i) (miscellaneous provisions);

MISCELLANEOUS

SEC. 10. (a) The Secretary of Agriculture may appoint such officers and employees, subject to the provisions of the Classification Act of 1923 and Acts amendatory thereof, and such experts as are necessary to execute the functions vested in him by this title; and the Secretary may make such appointments without regard to the civil service laws or regulations: Provided, That no salary in excess of $10,000 per annum shall be paid to any officer, employee, or expert of the Agricultural Adjustment Administration, which the Secretary shall establish in the Department of Agriculture for the administration of the functions vested in him by this title: And provided further, That the State Administrator appointed to administer this Act in each State shall be appointed by the President, by and with the advice and consent of the Senate. Title II of the Act entitled "An Act to maintain the credit of the United States Government", approved March 20, 1933, to the extent that it provides for the impoundment of appropriations on account of reductions in compensation, shall not operate to require such impoundment under appropriations contained in this Act.

(b) (2)[17] Each order issued by the Secretary under this title shall provide that each handler subject thereto shall pay to any authority

[17] Sec. 10 (b) (2) of the Agricultural Adjustment Act, as amended.

or agency established under such order such handler's pro rata share (as approved by the Secretary) of such expenses as the Secretary may find will necessarily be incurred by such authority or agency, during any period specified by him, for the maintenance and functioning of such authority or agency, other than expenses incurred in receiving, handling, holding, or disposing of any quantity of a commodity received, handled, held, or disposed of by such authority or agency for the benefit or account of persons other than handlers subject to such order. The pro rata share of the expenses payable by a cooperative association of producers shall be computed on the basis of the quantity of the agricultural commodity or product thereof covered by such order which is distributed, processed, or shipped by such cooperative association of producers. Any such authority or agency may maintain in its own name, or in the names of its members, a suit against any handler subject to an order for the collection of such handler's pro rata share of expenses. The several District Courts of the United States are hereby vested with jurisdiction to entertain such suits regardless of the amount in controversy.

(c) The Secretary of Agriculture is authorized, with the approval of the President, to make such regulations with the force and effect of law as may be necessary to carry out the powers vested in him by this title.[18] Any violation of any regulation shall be subject to such penalty, not in excess of $100, as may be provided therein.

(f) The provisions of this title shall be applicable to the United States and its possessions, except the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam; except that, in the case of sugar beets and sugarcane, the President, if he finds it necessary in order to effectuate the declared policy of this Act, is authorized by proclamation to make the provisions of this title applicable to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and/or the island of Guam.[19]

(g) No person shall, while acting in any official capacity in the administration of this title, speculate, directly or indirectly, in any agricultural commodity or product thereof, to which this title applies, or in contracts relating thereto, or in the stock or membership interests of any association or corporation engaged in handling, processing, or disposing of any such commodity or product. Any person violating this subsection shall upon conviction thereof be fined not more than $10,000 or imprisoned not more than two years, or both.

(h) For the efficient administration of the provisions of part 2 of this title, the provisions, including penalties, of sections 8, 9, and 10 of the Federal Trade Commission Act, approved September 26, 1914, are made applicable to the jurisdiction, powers, and duties of the Secretary in administering the provisions of this title and to any

[18] Sec. 2 (g) of the Agricultural Marketing Agreement Act of 1937 deletes the following: ", including regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto".

[19] Sec. 2 (h) of the Agricultural Marketing Agreement Act of 1937 deletes the sentence: "The President is authorized to attach by Executive order any or all such possessions to any internal-revenue collection district for the purpose of carrying out the provisions of this title with respect to the collection of taxes".

person subject to the provisions of this title, whether or not a corporation. Hearings authorized or required under this title shall be conducted by the Secretary of Agriculture or such officer or employee of the Department as he may designate for the purpose. The Secretary may report any violation of any agreement entered into under part 2 of this title to the Attorney General of the United States, who shall cause appropriate proceedings to enforce such agreement to be commenced and prosecuted in the proper courts of the United States without delay.

(i) The Secretary of Agriculture upon the request of the duly constituted authorities of any State is directed, in order to effectuate the declared policy of this title and in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities or products thereof, to confer with and hold joint hearings with the duly constituted authorities of any State, and is authorized to cooperate with such authorities; to accept and utilize, with the consent of the State, such State and local officers and employees as may be necessary; to avail himself of the records and facilities of such authorities; to issue orders (subject to the provisions of section 8c) complementary to orders or other regulations issued by such authorities; and to make available to such State authorities the records and facilities of the Department of Agriculture: Provided, That information furnished to the Secretary of Agriculture pursuant to section 8d (1) hereof shall be made available only to the extent that such information is relevant to transactions within the regulatory jurisdiction of such authorities, and then only upon a written agreement by such authorities that the information so furnished shall be kept confidential by them in a manner similar to that required of Federal officers and employees under the provisions of section 8d (2) hereof.

(j) *The term "interstate or foreign commerce" means commerce between any State, Territory, or possession, or the District of Columbia, and any place outside thereof; or between points within the same State, Territory, or possession, or the District of Columbia, but through any place outside thereof; or within any Territory or possession, or the District of Columbia. For the purpose of this Act (but in nowise limiting the foregoing definition) a marketing transaction in respect to an agricultural commodity or the product thereof shall be considered in interstate or foreign commerce if such commodity or product is part of that current of interstate or foreign commerce usual in the handling of the commodity or product whereby they, or either of them, are sent from one State to end their transit, after purchase, in another, including all cases where purchase or sale is either for shipment to another State or for the processing within the State and the shipment outside the State of the products so processed. Agricultural commodities or products thereof normally in such current of interstate or foreign commerce shall not be considered out of such current through resort being had to any means or device intended to remove transactions in respect thereto from the provisions of this Act. As used herein, the word "State" includes*

Territory, the District of Columbia, possession of the United States, and foreign nations.[20]

(i) Section 12 (a) and (c) (relating to appropriation and expense);

APPROPRIATION

SEC. 12. (a) There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000,000 to be available to the Secretary of Agriculture for administrative expenses under this title and for payments authorized to be made under section 8. Such sum shall remain available until expended.

To enable the Secretary of Agriculture to finance, under such terms and conditions as he may prescribe, surplus reductions[21] with respect to the dairy- and beef-cattle industries, and to carry out any of the purposes described in subsections (a) and (b) of this section (12) and to support and balance the market for the dairy and beef cattle industries, there is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $200,000,000; Provided, That not more than 60 per centum of such amount shall be used for either of such industries.

(c) The administrative expenses provided for under this section shall include, among others, expenditures for personal services and rent in the District of Columbia and elsewhere, for law books and book of reference, for contract stenographic reporting services, and for printing and paper in addition to allotments under the existing law. The Secretary of Agriculture shall transfer to the Treasury Department, and is authorized to transfer to other agencies, out of funds available for administrative expenses under this title, such sums as are required to pay administrative expenses incurred and refunds made by such department or agencies in the administration of this title.

(j) Section 14 (relating to separability);

SEPARABILITY OF PROVISIONS

SEC. 14. If any provision of this title is declared unconstitutional, or the applicability thereof to any person, circumstance, or commodity is held invalid the validity of the remainder of this title and the applicability thereof to other persons, circumstances, or commodities shall not be affected thereby.

(k) Section 22 (relating to imports);

IMPORTS

SEC. 22 (a) Whenever the President has reason to believe that any one or more articles are being imported into the United States under such conditions and in sufficient quantities as to render or tend

[20] This italicized subsection was added by sec. 2 (i) of the Agricultural Marketing Agreement Act of 1937.

[21] Sec. 2 (j) of the Agricultural Marketing Agreement Act of 1937 deletes the words: "and production adjustments".

to render ineffective or materially interfere with any program or operation undertaken, or to reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title, or the Soil Conservation and Domestic Allotment Act, as amended, he shall cause an immediate investigation to be made by the United States Tariff Commission, which shall give precedence to investigations under this section to determine such facts. Such investigation shall be made after due notice and opportunity for hearing to interested parties and shall be conducted subject to such regulations as the President shall specify.

(b) If, on the basis of such investigation and report to him of findings and recommendations made in connection therewith, the President finds the existence of such facts, he shall by proclamation impose such limitations on the total quantities of any article or articles which may be imported as he finds and declares shown by such investigation to be necessary to prescribe in order that the entry of such article or articles will not render or tend to render ineffective or materially interfere with any program or operation undertaken, or will not reduce substantially the amount of any product processed in the United States from any commodity subject to and with respect to which any program is in operation, under this title or the Soil Conservation and Domestic Allotment Act, as amended: Provided, That no limitation shall be imposed on the total quantity of any article which may be imported from any country which reduces such permissible total quantity to less than 50 per centum of the average annual quantity of such article which was imported from such country during the period from July 1, 1928, to June 30, 1933, both dates inclusive.

(c) No import restriction proclaimed by the President under this section nor any revocation, suspension, or modification thereof shall become effective until fifteen days after the date of such proclamation, revocation, suspension, or modification.

(d) Any decision of the President as to facts under this section shall be final.

(e) After investigation, report, finding, and declaration in the manner provided in the case of a proclamation issued pursuant to subsection (b) of this section, any proclamation or provision of such proclamation may be suspended by the President whenever he finds that the circumstances requiring the proclamation or provision thereof no longer exists, or may be modified by the President whenever he finds that changed circumstances require such modification to carry out the purposes of this section.[22]

Sec. 2. The following provisions, reenacted in section 1 of this act, are amended as follows: [23]

Sec. 3. (a) The Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated

[22] Sec. 5 of Public, No. 461, 74th Cong., approved February 29, 1936, amended sec. 22 of the Agricultural Adjustment Act, as amended, by inserting after the words "this title," wherever they appeared, the words "or the Soil Conservation and Domestic Allotment Act, as amended,"; and by deleting the words "an adjustment" whenever they appeared, and inserting in lieu thereof the word "any."

[23] Subsections (a) to (j) inclusive, of section 2 of the Agricultural Marketing Agreement Act of 1937 are incorporated in the preceding text and in the footnotes.

by him, upon written application of any cooperative association, incorporated or otherwise, which is in good faith owned or controlled by producers or organizations thereof, of milk or its products, and which is bona fide engaged in collective processing or preparing for market or handling or marketing (in the current of interstate or foreign commerce, as defined by paragraph (i) of section 2 of this act), milk or its products, may mediate and, with the consent of all parties, shall arbitrate if the Secretary has reason to believe that the declared policy of the Agricultural Adjustment Act, as amended, would be effectuated thereby, bona-fide disputes, between such associations and the purchasers or handlers or processors or distributors of milk or its products, as to terms and conditions of the sale of milk or its products. The power to arbitrate under this section shall apply only to such subjects of the term or condition in dispute as could be regulated under the provisions of the Agricultural Adjustment Act, as amended, relating to orders for milk and its products.

(b) Meetings held pursuant to this section shall be conducted subject to such rules and regulations as the Secretary may prescribe.

(c) No award or agreement resulting from any such arbitration or mediation shall be effective unless and until approved by the Secretary of Agriculture, or such officer or employee of the Department of Agriculture as may be designated by him, and shall not be approved if it permits any unlawful trade practice or any unfair method of competition.

(d) No meeting so held and no award or agreement so approved shall be deemed to be in violation of any of the antitrust laws of the United States.

Sec. 4. Nothing in this act shall be construed as invalidating any marketing agreement, license, or order, or any regulation relating to, or any provision of, or any act of the Secretary of Agriculture in connection with, any such agreement, license, or order which has been executed, issued, approved, or done under the Agricultural Adjustment Act, or any amendment thereof, but such marketing agreements, licenses, orders, regulations, provisions, and acts are hereby expressly ratified, legalized, and confirmed.

Sec. 5. No processing taxes or compensating taxes shall be levied or collected under the Agricultural Adjustment Act, as amended. Except as provided in the preceding sentence, nothing in this act shall be construed as affecting provisions of the Agricultural Adjustment Act, as amended, other than those enumerated in section 1. The provisions so enumerated shall apply in accordance with their terms (as amended by this act) to the provisions of the Agricultural Adjustment Act, this act, and other provisions of law to which they have been heretofore made applicable.

Sec. 6. This act may be cited as the "Agricultural Marketing Agreement Act of 1937."

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APPENDIX B

A COMPARISON OF THE PROPOSED CHICAGO MILK MARKETING AGREEMENT AND ORDER NO. 41 AS ISSUED

A comparison of the milk marketing agreement and order submitted for consideration at the public hearing [Def. Ex. 1 (Original), Transcript of Record before the Secretary of Agriculture, Ex. 1], and Order No. 41 as issued (R. 8–22) shows that the two documents are identical in general framework, underlying scheme of regulation and classes of persons affected. The differences occur in matters of detail which should properly be determined on the basis of the evidence adduced at the public hearing.

Each of the two documents contains ten sections having identical headings and dealing with identical features of the plan of regulation. Order No. 41 contains in addition three formal sections appearing in all orders, namely, a section containing the Secretary's findings, a section dealing with the effective time and suspension or termination of the order, and a section fixing the liability of handlers as several and not joint; and also a section setting up a market advisory committee with no powers whatever but simply constituting a contact group between the market administrator and the industry.

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Section 1

Section 1 in each document contains nine definitions, six of which are identical as between the two documents. As to the remaining three:

The *marketing area,* as defined in Order No. 41, contains no territory not included in the marketing area as defined in the proposal, but does not include all of the territory included in the proposal.

The definition of *producer* is the same except that the phrase "new producer" is eliminated by Order No. 41 as being obviously superfluous, and the general phraseology is clarified.

In defining a *handler* the phraseology appearing in the proposal is clarified by Order No. 41 and the definition is made to include the handling of cream as well as fluid milk in the marketing area.

Section 2

Section 2, establishing the office of the market administrator, is identical in both documents.

Section 3

Section 3, dealing with reports, is identical in both documents except for the phrase "and new producer" which is eliminated from the proposal in two places as being obviously superfluous.

Section 4

Section 4, dealing with the classification of milk, is identical in both documents as to the provisions concerning Class III milk and interhandler and nonhandler sales.

The provisions concerning Class I milk and Class II milk are the same except that flavored milk and flavored milk drinks, placed in Class I by the proposal, are taken out of Class I and put in Class II, and milk used for cottage cheese, which is not dealt with specifically in the proposal, is placed in Class II by the order.

Section 5

Section 5, dealing with minimum prices, is *the same* in the following respects:

(1) All prices are based on milk of 3.5% butterfat.

(2) The formula for pricing Class I milk is a premium over the prevailing condensery price for milk computed according to the formula set forth in the evaporated milk marketing agreement of May 31, 1935.

(3) The basic prices are for milk f. o. b. a plant located not more than 70 miles from the City Hall in Chicago.

The two documents *differ* as to this section in the following respects:

(1) Class I.

The proposal fixed a premium of 80¢, with a minimum of $1.80 and a maximum of $2.20 per hundredweight. The order fixed a premium of 70¢ for milk delivered from July 1 to November 30, 55¢ for milk delivered from December 1 to April 30, and 45¢ for milk delivered from May 1 to June 30, and fixed a special price of $1.395 for Class I milk disposed of in relief channels.

(2) Class II.

The proposal fixed the price on a formula based on the wholesale price for bottling cream in Chicago. The order adopted the same formula used for Class I with the following scale of premiums: 32¢, 28¢, and 25¢.

(3) Class III.

The proposal fixed the price at 3½ times the current price for 92 score butter at Chicago, plus 10%. The order raised the 10% to 20%, and provided that, if the milk were used for making evaporated milk, the price should be the price computed according to the formula set forth in the marketing agreement for evaporated milk.

(4) Out-of-market sales.

The provision pricing out-of-market sales is identical in both documents, with the exception that the order adds provisions allowing to the handler freight differentials for milk delivered beyond the 70-mile zone.

ADDED: An additional subsection was placed in Order No. 41 allowing a handler freight differentials for milk delivered beyond the 70-mile zone.

Section 6

Producer-distributors

The two documents are *alike* in treatment of the case of a producer-distributor who buys no milk from producers or an association of producers.

In dealing with the producer-distributor who buys milk from producers or an association of producers, both documents provide that milk in each class purchased from other handlers is excluded from the pool computation.

Otherwise, the following minor *differences* occur:

(a) The order provides that in the pool computation 95%, instead of 90% as proposed, of the distributor's own production is excluded from his Class I and Class II sales, and 5%, instead of 10%, of such milk is excluded from his Class III sales.

ADDED: Another provision is added by the order fixing the price of bulk milk or cream sold by the producer-distributor to another handler at the Class III price unless otherwise used.

Section 7

Uniform price to producers

In substance the two documents are identical in fixing the value of milk to each handler at the applicable class prices and in providing a uniform price to producers computed by dividing the total value of the milk reported by all handlers in the market by the total quantity of such milk. Only minor differences in phraseology and subordinate elements appear.

Section 8

Payments for milk

The provisions dealing with payments for milk are identical in substance. Each document requires payment of the uniform price, subject to butterfat and location differentials, to each producer; and establishes a market-wide equalization pool and a producer settlement fund, maintained by the market administrator, into which, or from

which, a handler pays or draws, as the case may be, if the total value of the milk used by him is greater, or less, than his total payments to producers at the uniform price. Only minor differences in phraseology and subordinate elements appear.

Section 9

Expense of administration

Subsection (a) is the same in both documents except that the order requires payment on the 15th day after the end of each delivery period instead of the 25th day as proposed. Such changes as appear in the phraseology are obviously for clarification.

Subsection (b) is identical in both documents.

Section 10

Marketing services

Subsection (a) is the same in substance in both documents, except that the order requires payment on the 15th day after the end of the delivery period instead of the 25th day. Minor changes in phraseology are obviously for clarification.

Subsection (b) is the same except that the order requires payment on the 15th day after the end of the delivery period instead of the 25th day as proposed.

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